Navigating between principle and pragmatism : the roles and functions of atrocity-related United Nations Commissions of Inquiry in the international legal order

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CHAPTER SIX

TRANSLATING VIOLATIONS TO RESPONSIBILITY REGIMES IN AN 'ERA OF ACCOUNTABILITY'

Introduction

In 2010, citing developments in international criminal law, the UN Secretary-General heralded the birth of a new "age of accountability" and the demise of the "old era of impunity".[1756] The concept of accountability frequently appears in commissions' mandates, often in the form of instructions to determine responsibilities, identify perpetrators and make recommendations with a view to ensuring that those responsible are held accountable. On account of the strong emphasis on accountability in contemporary inquiry practice, this Chapter zooms in on commissions' roles and functions with respect to the concept of accountability, in light of the institutional and political contexts in which they operate.

Chapter Six is organised as follows. Section 1 discusses how commissions understood different dimensions of the concept of accountability and the interplay with responsibility for violations of international law. Section 2 examines how commissions assessed responsibilities for violations of international law. Which actors were put in the spotlight, and to what extent did commissions engage with responsibility regimes? Section 3 discusses how commissions formulated accountability recommendations in light of their institutional features and constraints. Section 4 steps back to discuss commissions' roles and functions with respect to different dimensions of accountability. Conclusions are then drawn as to commission's roles and functions with respect to ensuring accountability for violations of international law.

1. Dimensions of Accountability

Commissions identified different dimensions of accountability and its relationship with legal responsibility. Commissions generally identified a duty to enforce legal responsibilities for violations in IHL and IHRL.[1757] Some explained that accountability referred to a range of measures to enforce responsibility for violations, including but not limited to prosecutions. The Libya Commission wrote that accountability "incorporates various methods including criminal prosecutions, disciplinary measures, administrative procedures and victim compensation measures"[1758] and should not be limited to prosecutions. Accountability may be sought via judicial and non-judicial means. Commissions also emphasised the need for responsibilities to be enforced in practice. For instance, the Sri Lanka Panel wrote that

[1756] Secretary-General, 'The Age of Accountability', 27 May 2010, available at http://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability (accessed 1 May 2018) and Secretary-General, 'In 'New Age of Accountability', International Criminal Court, Security Council Can Work Together to 'Deliver both Justice and Peace', Secretary-General Says', UN Docs. SG/SM/14589-SC/10794-L/3200, 17 October 2012, available at http://www.un.org/press/en/2012/sgsm14589.doc.htm (accessed 1 May 2018).

[1757] E.g., *Gaza Report*, *supra* note 766, para. 602.

[1758] *Libya Second Report*, *supra* note 853, para. 763.

assigning responsibility is an important but insufficient pre-condition for accountability, which attaches "consequences to individuals or institutions deemed responsible".[1759]

Some commissions recognised broader dimensions to accountability beyond enforcing responsibilities for specific violations. The Syria Commission wrote that a holistic approach to accountability was needed as "judicial measures alone do not suffice to sustainably address serious violations"[1760] and that measures must be tailored towards "a sustainable culture of accountability and rule of law."[1761] In a different formulation, the Sri Lanka Panel wrote that accountability is "a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity".[1762] The Panel identified non-legal dimensions of responsibility, which were to be addressed through the process of accountability. Recommendations in pursuit of aims such as durable peace and a culture of the rule of law are more political in nature and reflect key goals of transitional justice, defined by the UN as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[1763]

Different dimensions of accountability have also been identified by other UN actors and scholars. The Secretary-General stated that as the R2P principle "encompasses legal, moral and political responsibilities, so too must our approach to accountability."[1764] Lisa Yarwood identifies legal, moral and political accountability on the part of states for internationally wrongful acts.[1765] Ted Piccone proposes a similar typology of accountability in the inquiry context.[1766] Piccone writes that legal' accountability centres on prosecutions of international crimes; 'moral' accountability gives effect to the right to truth and 'political' accountability includes naming and shaming, lustration, targeted sanctions, memorialisation, compensation to victims, and guarantees of non-recurrence.[1767] This typology indicates the interrelatedness of such dimensions, as several measures categorised by Piccone as 'moral' or 'political' in nature are recognised as legal remedies for violations. However, such typologies usefully illustrate the multifaceted nature of accountability. Having made these preliminary observations, the discussion turns to commissions' engagement with responsibility regimes.

[1759] *Sri Lanka Report*, *supra* note 29, para. 299.
[1760] *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 127.
[1761] *Ibid*., at 128. See *Syria First Report*, *supra* note 32, para. 85.
[1762] *Sri Lanka Report*, *supra* note 29, para. 8.
[1763] *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, at 4, available at http://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 1 May 2018) [*Transitional Justice Guidance Note*]. See Yasmin Sooka, 'Dealing with the past and transitional justice: building peace through accountability', (2006) 88(862) IRRC 311-325.
[1764] *Report of the Secretary-General: Implementing the Responsibility to Protect: Accountability for Prevention*, UN Doc. S/2017/556, 10 August 2017, para. 11 [*Implementing R2P*].
[1765] Lisa Yarwood, S*tate Accountability under International Law: Holding States Accountable for a Breach of* Jus Cogens *Norms* (Oxon: Routledge, 2011) at 159.
[1766] Ted Piccone, 'U.N. human rights commissions of inquiry: The quest for accountability', *The Brookings Institution*, December 2017, available at http://www.brookings.edu/wp-content/uploads/2017/12/fp_20171208_un_human_rights_commisions_inquiry.pdf (accessed 1 May 2018).
[1767] *Ibid*., at 3-4.

2. Responsibility Under International Law

Commissions have observed that international responsibilities of different actors may be triggered by the same incident.[1768] For instance, the Gaza Flotilla Commission observed that "individual criminal liability and State responsibility may arise from the same act."[1769] Commissions framed responsibility assessments in light of their institutional setting. The non-binding nature of their reports and low standard of proof of 'reasonable basis to believe'[1770] meant that their findings were not final determinations but instead placed actors on notice of the need for corrective action. Commissions also disavowed a prosecutorial function.[1771] For instance, the North Korea Commission was "neither a judicial body nor a prosecutor";[1772] instead its findings of crimes against humanity would merit a criminal investigation. The CAR Commission observed that it "is not a judicial body but it views its work as a vital step towards encouraging and facilitating criminal investigations and prosecutions".[1773] Commissions embraced their mandates to assess responsibilities while distinguishing their work from judicial determination. This Section discusses commissions' engagement with responsibilities of different actors, namely states (2.1), international organisations (2.2), collective non-state actors (2.3) and individuals (2.4). Some general observations in respect of commissions' approaches to responsibility are then made (2.5).

2.1 State responsibility

Commissions generally paid significant attention to the responsibility of states for violating international law, reflecting the fact that these actors bear extensive obligations, especially towards populations under their jurisdiction.[1774] Not all commissions examined state responsibility; exceptions include inquiries focussing on individual criminal responsibility.[1775] This Section discusses how wide commissions cast their nets in scrutinising states' actions (2.1.1) and their engagement with rules of attribution (2.1.2).

2.1.1 Territorial and third states

Commissions chiefly focussed on responsibilities of territorial states and states with a direct presence in situations of concern. Such presence could arise through occupation, such as the several inquiries into Israeli responsibility arising out of the occupation of Palestinian territories. States were also scrutinised where they participated in armed conflict. For instance, the Syria Commission examined responsibilities arising out of Russian and US military operations in the Syrian armed conflict.[1776] Erika de Wet argues that states' invited participation in armed conflict may give rise to complicity liability where the inviting State is

[1768] E.g., *Libya Second Report*, *supra* note 853, para. 326; *Darfur Report*, *supra* note 32, para. 593; *Sri Lanka Report*, *supra* note 29, para. 191.
[1769] *Gaza Flotilla Report*, *supra* note 681, para. 47.
[1770] See Chapter Three, Section 4.3.
[1771] E.g., *Sri Lanka Report*, *supra* note 29, para. 260; *CAR Report*, *supra* note 32, para. 16; *Timor-Leste Report*, *supra* note 376, at 2.
[1772] *North Korea Report*, *supra* note 32, para. 1023.
[1773] *CAR Report*, *supra* note 32, para. 24, citing *CAR Mandate*, *supra* note 304.
[1774] E.g., *Darfur Report*, *supra* note 32, para. 628.
[1775] E.g., *Yugoslavia Mandate*, *supra* note 290; *Rwanda Mandate*, *supra* note 296 and *Cambodia Mandate*, *supra* note 323.
[1776] E.g., *Syria Fourteenth Report*, *supra* note 982, para. 61; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/37/72, 1 February 2018, para. 31.

implicated in serious violations of IHL and IHRL.[1777] Commissions have not yet considered this potential type of liability.

Third states' responsibilities for contributing to situations of atrocities have been addressed to varying extents. For instance, the North Korea Commission examined China's practice of forcibly repatriating North Koreans, finding that China violated the principle of non-refoulement.[1778] Some commissions examined third states' involvement in conflicts, but did not usually enter findings of responsibility. For instance, the Libya Commission observed that militias fighting the Gadhafi regime were believed to have received equipment from states including Qatar and France,[1779] but did not discuss their responsibilities. Heller writes that it is surprising that the Commission did not assess whether those actions breached the Security Council's arms embargo.[1780] The Syria Commission also examined the role of third states, albeit to a limited extent. It found that several states had supplied weapons used to perpetrate violations[1781] and identified an obligation not to do so when there was a risk of such use,[1782] but stopped short of finding responsibility. Instead, such matters were framed as recommendations to cease supplying arms in increasingly strong terms.[1783] In 2013, the Syrian Government had critiqued the Commission's lack of attention to states that "finance, arm, train and harbour"[1784] terror groups. In response, the Commission noted that the Chair had criticised the supply of arms to the parties to the conflict;[1785] however, those remarks did not mention other forms of support or financing.[1786] Later, the Commission identified Jabhat Al-Nusra and ISIS as parties to the conflict, observing that support for the latter was growing in terms of recruits and equipment.[1787] However, it did not discuss whether states had provided such support, and framed other remarks as recommendations to curb the influence of extremist factions[1788] and prevent the financing of terrorism.[1789] In short, commissions referred to states' ancillary involvement in situations of atrocities to some extent, but their focus usually remained on territorial states and states with some physical presence in situations of concern.

It may be queried whether state responsibility may also arise in connection with obligations held *erga omnes*. The ILC Articles on State Responsibility for Internationally Wrongful Acts

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[1777] Erika de Wet, 'Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request', (2018) 67(2) ICLQ 287-313.
[1778] *North Korea Report*, *supra* note 32, para. 490.
[1779] *Libya Second Report*, *supra* note 853, para. 70.
[1780] Heller, *supra* note 96, at 46, citing SC Res. 1970 (2011), para. 9.
[1781] E.g., *Syria Eighth Report*, *supra* note 983, para. 139.
[1782] E.g., *Syria Seventh Report*, *supra* note 805, para. 153.
[1783] 'Curb': *Syria Fourth Report*, *supra* note 1097, para. 175(b); 'restrict': *Syria Fifth Report*, *supra* note 1046, para. 164(d); 'stop': *Syria Sixth Report*, *supra* note 1126, para. 203(c); *Syria Seventh Report*, *supra* note 805, para. 153; 'refrain': *Syria Fourteenth Report*, *supra* note 982, para. 90(a).
[1784] *Syria note verbale 9 January 2013*, *supra* note 1118, at 33. See *Syria note verbale 21 December 2011*, *supra* note 1109.
[1785] *Syria note verbale 15 January 2013*, *supra* note 1119, at 35.
[1786] 'Statement by Paulo Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, at the HRC 21st regular session', 17 September 2012, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/Statement17September2012.pdf (accessed 1 May 2018).
[1787] *Syria Fifth Report*, *supra* note 1046, para. 29.
[1788] *Ibid*., para. 164(d); *Syria Sixth Report*, *supra* note 1126, para. 203(d).
[1789] *Syria Seventh Report*, *supra* note 805, para. 153.

(*Articles on State Responsibility*) provide that serious breaches of peremptory norms[1790] engender positive duties on the part of the international community of states to cooperate to lawfully bring them to an end and refuse to recognize situations arising out of such breaches as lawful.[1791] Commissions recognised the prohibitions of torture, genocide, and crimes against humanity as peremptory norms.[1792] They did not however assess potential responsibilities of third states for failing to bring such situations to an end. Instead, such matters were framed as ongoing obligations and addressed in recommendations.[1793]

2.1.2 Attribution of conduct

Commissions readily found that states could be responsible for violating international law. However, their extent of engagement with rules of state responsibility is another matter. The HRC's Burundi Commission set out state responsibility rules in some detail[1794] but most commissions only referred to them in passing, if at all. Where violations were carried out by *de jure* state organs such as the armed forces or government officials, commissions did not usually spell out the basis for responsibility. The Burundi Commission, Goldstone Commission and Gaza Flotilla Commission did expressly attribute the conduct of officials.[1795]

Commissions examined questions of attribution more closely where violations were ostensibly carried out by non-state actors. For instance, the Darfur Commission considered whether violations by Janjaweed militias were attributable to Sudan. Where militias were incorporated into Sudan's armed forces, the Commission found that they were state organs.[1796] Where not incorporated, the Commission considered whether they were "acting on the instructions of, or under the direction or control"[1797] of Sudan. In considering the requisite degree of control to attribute responsibility, the Darfur Commission cited the *Tadić Appeal Judgment* which requires an armed group to be under the state's "overall control",[1798] entailing "a role in organising, coordinating or planning the [group's] military actions"[1799] alongside other forms of support. On the facts, the Commission found that most Janjaweed attacks occurred with officials' acquiescence and sometimes their participation;[1800] and that the coordination of attacks showed "clear links" between them.[1801] The Commission's preference for the 'overall control' test is perhaps not surprising given that its Chair endorsed this standard judicially at the ICTY[1802] and extra-judicially.[1803] It diverges from the ICJ's

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[1790] VCLT, *supra* note 1180, Art. 53.
[1791] ILC, *Articles on State Responsibility for Internationally Wrongful Acts*, GA Res. 56/83, 12 December 2001, Art. 41 [ARSIWA].
[1792] E.g., *Yugoslavia Final Report*, *supra* note 39, para. 107; *Darfur Report*, *supra* note 32, para. 376; *Goldstone Report*, *supra* note 633, para. 1549; *North Korea Report*, *supra* note 32, para. 1195.
[1793] ARSIWA, *supra* note 1791, Art. 41(1) and (2). See, e.g., *North Korea Report*, *supra* note 32, footnote 1672 and *Israeli Settlements Report*, *supra* note 572, para. 116.
[1794] *HRC Burundi Detailed Report*, *supra* note 405, paras. 66-72.
[1795] *Ibid*., para. 203; *Goldstone Report*, *supra* note 633, para. 814; *Gaza Flotilla Report*, *supra* note 681, para. 46.
[1796] *Darfur Report*, *supra* note 32, para. 124; see ARSIWA, *supra* note 1791, Art. 4.
[1797] ARSIWA, *supra* note 1791, Art. 8.
[1798] *Tadić Appeal Judgment*, *supra* note 1289, para. 120. The Commission's reasoning is not entirely clear; it wrote that when militias attacked with the Sudanese army they were under its "effective control" but cited *Tadić*: *Darfur Report*, *supra* note 32, para. 125.
[1799] *Tadić Appeal Judgment*, *supra* note 1289, para. 137.
[1800] *Darfur Report*, *supra* note 32, paras. 125 and 302-303.
[1801] *Ibid*., para. 111.
[1802] *Tadić Appeal Judgment*, *supra* note 1289.

more rigorous tests of acting pursuant to a state's 'specific instructions' or under its 'complete dependence' or 'effective control'.[1804] If the ICJ's standards were applied, it is unlikely that the Janjaweed's actions would be attributable to Sudan. By contrast, the HRC's Burundi Commission adopted the ICJ's standards of 'effective control' and 'total dependence' when assessing whether violations by the *Imbonerakure* (youth wing of the ruling political party) could be attributed to Burundi,[1805] and found that these standards were met on the facts.[1806] The Commission also found Burundi responsible for violations by *Imbonerakure* members by adopting their conduct as its own.[1807]

Some commissions attributed armed groups' conduct to states without explaining the basis of attribution. For instance, the Guinea Commission found evidence of a coordinated attack against protestors by security forces, military police and militias,[1808] and concluded that Guinea was also responsible for violations by militias who "cooperated"[1809] with security forces. The Syria Commission wrote that although the *Shabbiha* militia's structure was opaque, its members "acted with the acquiescence of, in concert with or at the behest of Government forces".[1810] Neither inquiry cited legal standards for attribution. Coordination and cooperation might amount to overall control but would not likely satisfy the effective control standard.

2.2 Responsibility of international organisations

International organisations may also be responsible for internationally wrongful acts.[1811] Commissions frequently directed recommendations to international organisations but rarely assessed their legal responsibilities. Notably, an inquiry by the Secretary-General into the UN's actions in respect of the Rwandan genocide[1812] recommended that the UN "acknowledge its part of the responsibility for not having done more to prevent or stop the genocide"[1813] but did not identify legal liability, and also used the term 'responsibility' in a moral sense.[1814]

Some commissions examined the actions of multinational forces, particularly when acting as parties to the conflict. As discussed in Chapter Four, UN atrocity inquiries identified that

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[1803] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18(4) EJIL 649-668.

[1804] *Bosnia Genocide Case*, *supra* note 1289, paras. 392 and 400; *Nicaragua Case*, *supra* note 1352, paras. 110 and 115; ILC, *Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/CN.4/SER.A/2001/Add.1, at 47-48 [*ARSIWA Commentary*] and Marko Milanovic, 'State Responsibility for Genocide', (2006) 17 EJIL 553-604, at 585.

[1805] *HRC Burundi Detailed Report*, *supra* note 405, para. 208.

[1806] *Ibid*., paras. 209-219.

[1807] *Ibid*., paras. 220-221.

[1808] *Guinea Report*, *supra* note 39, paras. 183, 192, 200 and 222.

[1809] *Ibid*., para. 201.

[1810] *Syria Third Report*, *supra* note 564, para. 133.

[1811] *Reparation for Injuries Opinion*, *supra* note 198, at 174 and DARIO, *supra* note 14. See Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan (eds), 'Responsibility of the United Nations', in *Oppenheim's International Law: United Nations* (Oxford: OUP, 2017) 429-451.

[1812] *UN Rwanda Mandate*, *supra* note 375.

[1813] *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257, 16 December 1999, Recommendation 14.

[1814] *Ibid*., at 37.

these actors must abide by customary IHL when engaged in hostilities.[1815] The CAR Commission examined the responsibility of UN forces for violations during peacekeeping operations, and specifically discussed IHRL violations by national contingents of Chad and the Republic of Congo. Its creative accountability recommendations in respect of these actors are discussed in Section 3. Other commissions examined the conduct of multinational forces but did not make findings of responsibility, such as the Libya Commission's investigation of NATO's air campaign in Libya. NATO opposed that line of inquiry, arguing first that the Commission's mandate was limited to IHRL violations[1816] and later that the Commission's examination of the parties to the conflict should not include NATO.[1817] Nonetheless, the Commission did investigate, finding that some NATO attacks caused civilian casualties where targets "showed no evidence of military utility".[1818] However, it did not feel able to draw conclusions on the basis of information provided by NATO.[1819] Nor did it make findings of responsibility; its recommendation for compensation was based on NATO guidelines for payments provided "without reference to the question of legal liability."[1820] Heller remarks that the Commission's assessment of NATO's responsibility was "remarkably conservative" and ventures that "although it did not prevent the Commission from expanding its mandate, NATO's pressure on the Commission to downplay potential violations of IHL was at least partially successful."[1821]

2.3 Responsibility of collective non-state actors

Although state responsibility dominated discussion in inquiry reports, commissions occasionally considered responsibilities of collective non-state actors, namely organised armed groups (2.3.1) and corporations (2.3.2).

2.3.1 Organised armed groups

The international legal rules deemed by commissions as applicable to organised armed groups were traversed in Chapter Four. To recap, commissions recognised that these actors have IHL obligations when acting as parties to armed conflict[1822] and considered whether they might bear human rights obligations. While most commissions did not consider that armed groups held treaty-based obligations, some identified customary obligations where groups exercised effective control over territory.[1823] In determining whether armed groups could be collectively responsible, commissions examined their structure and organisation. For instance, the Darfur Commission wrote that rebel groups had "a certain threshold of organization, stability and effective control of territory, [to] possess international legal personality"[1824] so as to be bound by IHL. Due to operational difficulties, the HRC's Burundi Commission could not determine

[1815] *CAR Report*, *supra* note 32, paras. 568-569; *Libya Second Report*, *supra* note 853, para. 613.
[1816] *NATO letter 23 January 2012*, *supra* note 1527. NATO reiterated its concerns in *NATO letter 15 February 2012*, *supra* note 997, at 1.
[1817] *NATO letter 15 February 2012*, *supra* note 997, at 1.
[1818] *Libya Second Report*, *supra* note 853, para. 812.
[1819] *Ibid*., para. 812.
[1820] *Ibid*., para. 130(b), citing NATO, *Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property* (2010), Guideline 9 [*NATO Guidelines*].
[1821] Heller, *supra* note 96,at 50.
[1822] See Chapter Four, Section 3.2.
[1823] See Chapter Four, Section 2.4.
[1824] *Darfur Report*, *supra* note 32, para. 172.

whether the *Imbonerakure* was sufficiently organised so as to attract collective responsibility but signalled the legal relevance of this issue.[1825]

Commissions did not identify specific rules of responsibility applicable to armed groups. For instance, the Libya Commission observed that *thuwar* militias had human rights obligations[1826] but also that "liability for violations generally attaches to state parties rather than non-state entities such as the *thuwar*."[1827] The Commission seemed to disconnect substantive obligations from their enforceability. Indeed, the ICRC writes that because armed groups must respect IHL it can be argued that they incur responsibility, yet "the consequences of such responsibility are not clear."[1828] The extent to which commissions engaged with enforcement action in respect of such actors is discussed in Section 3.

2.3.2 Corporations

There is emerging recognition of international rights and duties on the part of corporations.[1829] The UN *Guiding Principles on Business and Human Rights* (*Ruggie Principles*) recognise corporate responsibility to respect certain human rights[1830] but note that this responsibility is "distinct from issues of legal liability and enforcement, which remain defined largely by national law".[1831] The potential liability of such actors is recognised in the UN's *Principles on the Right to a Remedy*.[1832] However, commissions have not identified international legal obligations for business enterprises. The Israeli Settlements Commission referred to the *Ruggie Principles* but did not address their legal status.[1833]

Commissions occasionally found that transnational corporations and private enterprises contributed to situations of violations. For instance, the Eritrea Commission acknowledged the importance of private enterprises in supporting that authoritarian regime.[1834] The Sri Lanka Panel observed that the Tamil Tigers engaged in "mafia style tactics abroad" to generate funds, including using private businesses as front organisations.[1835] Having found that Israeli settlements in Palestinian territories were illegal,[1836] the Israeli Settlements Commission wrote that businesses "enabled, facilitated and profited from the construction and growth of the settlements"[1837] by providing supplies and services in "full knowledge of the

[1825] *HRC Burundi Detailed Report*, *supra* note 405, paras. 224-226.
[1826] *Libya Second Report*, *supra* note 853, para. 18.
[1827] *Ibid*., para. 261.
[1828] *ICRC Customary IHL Study*, *supra* note 1298, Rule 149.
[1829] E.g., José Alvarez, 'Are Corporations Subjects of International Law?', (2011) 9 Santa Clara J Int'l L 1-36 and Larissa van den Herik and Jernej Letnar Černič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again', (2010) 8(3) JICJ 725-743.
[1830] OHCHR, *Guiding Principles on Business and Human Rights*, UN Doc. HR/PUB/11/04 (2011) [*Ruggie Principles*]. See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/17/31, 21 March 2011, Principle 12.
[1831] *Ruggie Principles*, *supra* note 1830, Commentary to Principle 12.
[1832] *Principles on the Right to a Remedy*, *supra* note 540, Principle 15.
[1833] *Israeli Settlements Report*, *supra* note 572, para. 117.
[1834] *Eritrea Second Report*, *supra* note 569, paras. 154 and 234.
[1835] *Sri Lanka Report*, *supra* note 29, para. 419.
[1836] *Israeli Settlements Report*, *supra* note 572, para. 104.
[1837] *Ibid*., para. 96.

current situation and the related liability risks".[1838] While not assigning international responsibility to these actors, commissions addressed their conduct through recommendations. These proposals are discussed in Section 3.

2.4 Individual responsibility

Individuals may bear responsibility for certain conduct prohibited under international law. Commissions recognised that individuals may bear international criminal responsibility, with some inquiries focussing strongly on individual responsibility for violations.[1839] In making these assessments, commissions pointed out that they were not exercising a prosecutorial or judicial function.[1840] Some authors suggest that individuals might also bear international *civil* liability.[1841] This possibility was left open in the ILC's Commentary on state responsibility,[1842] and civil liability for international legal violations is possible in some domestic jurisdictions.[1843] While non-penal consequences such as reparations may follow conviction for international crimes in some jurisdictions,[1844] whether individuals have international civil obligations is a different matter.[1845] As commissions have not discussed civil liability,[1846] this Section focuses on criminal responsibility. It discusses commissions' engagement with elements of ICL (2.4.1) and the issue of identification of suspected perpetrators (2.4.2).

2.4.1 Engagement with international criminal law

Commissions readily accepted that individuals may be responsible for international crimes.[1847] When assessing such responsibility, commissions engaged with elements of ICL to differing extents. At one end of the spectrum, some commissions referred to criminal responsibility in a general way, without identifying specific crimes.[1848] For instance, the

[1838] *Israeli Settlements Report*, *supra* note 572, para. 97.
[1839] E.g., *Rwanda Final Report*, *supra* note 297, para. 3.
[1840] E.g., *Sri Lanka Report*, *supra* note 29, para. 260; *Guinea Report*, *supra* note 39, para. 180; *CAR Report*, *supra* note 32, para. 16 and *North Korea Report*, *supra* note 32, para. 1023.
[1841] E.g., Andrew Clapham, 'The Role of the Individual in International Law', (2010) 21(1) EJIL 25-30, at 30 and Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP, 2016) at 152.
[1842] *ARSIWA Commentary*, *supra* note 1804, at 142.
[1843] E.g., UNTAET Regulations provide for civil proceedings based on suspected crimes: UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UN Doc. UNTAET/REG/2000/30, 25 September 2000, ss. 49(1) and 49(2). The Alien Tort Statute 28 USC § 1350 (US) provides a tortious cause of action for violations of international law.
[1844] E.g., Rome Statute, *supra* note 1033, Art. 75.
[1845] Some authors use the term 'individual civil responsibility' to refer to consequences beyond imprisonment for international crimes, such as reparations orders: e.g., Friedrich Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression', (2012) 10(1) JICJ 249-265. This Study views reparations ordered on the basis of a criminal conviction as part of criminal responsibility, as the order stems from a breach of penal law.
[1846] Rosenfeld argues that the Darfur Commission alluded to individual civil liability: Rosenfeld, *supra*, footnote 24, citing *Darfur Report*, *supra* note 32, para. 600. The Commission identified a collective responsibility of 'international non-state entities' to pay compensation and a trend towards recognising victims' rights to compensation "from the individual who caused his or her injury": para. 175 and footnote 217. The authorities cited therein recognised individual liability for reparations arising out of criminal conviction: *Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General*, UN Doc. S/2000/1063, 3 November 2000, para. 20.
[1847] E.g., *Syria Third Report*, *supra* note 564, Annex II, para. 27 and *Rwanda Final Report*, *supra* note 297, paras. 169-171.
[1848] E.g., *UNCHR Gaza Report*, *supra* note 536, para. 119.

Israeli Settlements Commission stated that the transfer of Israeli citizens into Palestine was "prohibited under [IHL] and [ICL]".[1849] Some commissions went slightly further, identifying species of crimes without classifying specific incidents. For instance, the Gaza Flotilla Commission found that Israeli forces' violations of IHL, including wilful killing and torture, were "within the terms of article 147 of [Geneva Convention IV]".[1850] The Lebanon Commission identified species of war crimes and "violations of a number of core human rights"[1851] as giving rise to criminal responsibility. That approach did not discuss differences between underlying violations and crimes, such as the need for criminal intent.

Further along the continuum, some commissions identified different elements of international crimes.[1852] The commissions on Libya and Syria quoted from the ICC's Elements of Crimes when assessing murder as a war crime and a crime against humanity.[1853] The Goldstone Commission wrote that objective elements were established in respect of all its findings of criminal responsibility, and that it could determine whether *mens rea* was satisfied in almost all cases.[1854] Most commissions identified knowledge and intent as required *mens rea*,[1855] but a few considered advertent recklessness as sufficient in custom.[1856] Commissions generally gave more attention to subjective elements of crimes requiring *dolus specialis*.[1857]

Some commissions also acknowledged modes of liability but did not always apply them to specific incidents. Superior responsibility was frequently identified,[1858] reflecting its relevance in situations of mass atrocities where crimes were committed through collective entities and structures.[1859] Some commissions limited their discussion to superior responsibility[1860] or only briefly alluded to other modes of liability. For instance, the Syria Commission wrote that in addition to direct commission, "those who order these crimes to be committed (or plan, instigate, incite, aid or abet) are also liable."[1861] It did not analyse modes of liability in connection with specific incidents. The Sri Lanka Panel also identified different modes of liability[1862] but did simply stated that leaders were responsible "under these forms of liability."[1863] The Cambodia Commission took a similar approach, reasoning that its mandate was to determine whether there was sufficient evidence to justify bringing Khmer Rouge

[1849] *Israeli Settlements Report*, *supra* note 572, para. 38.
[1850] *Gaza Flotilla Report*, *supra* note 681, para. 182.
[1851] *Lebanon Report*, *supra* note 855, para. 347.
[1852] E.g., *Guinea Report*, *supra* note 39, paras. 180, 197 and 213-214; *HRC Burundi Detailed Report*, *supra* note 405, para. 672.
[1853] *Libya Second Report*, *supra* note 853, paras. 140-142; *Syria Third Report*, *supra* note 564, Annex II, para. 33.
[1854] *Goldstone Report*, *supra* note 633, para. 172.
[1855] E.g., *Syria Third Report*, *supra* note 564, para. 135; *North Korea Report*, *supra* note 32, para. 1042; *Libya Second Report*, *supra* note 853, footnote 176.
[1856] *Darfur Report*, *supra* note 32, para. 180 and 541; *Goldstone Report*, *supra* note 633, para. 172; *Sri Lanka Report*, *supra* note 29, paras. 197, 198 and 251(a) *contra North Korea Report*, *supra* note 32, paras. 1029 and 118, and footnotes 1544 and 1558.
[1857] E.g., *Darfur Report*, *supra* note 32, para. 180 (genocide), and *Libya Second Report*, *supra* note 853, para. 385 (persecution as a crime against humanity).
[1858] E.g., *Rwanda Interim Report*, *supra* note 298, para. 124; *Cambodia Report*, *supra* note 324, para. 81.
[1859] Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution', (2013) 13 MJIL 1-58.
[1860] E.g., *Yugoslavia Final Report*, *supra* note 39, paras. 55-58; *Libya Second Report*, *supra* note 853, para. 95.
[1861] *Syria Third Report*, *supra* note 564, para. 135.
[1862] *Sri Lanka Report*, *supra* note 29, para. 253.
[1863] *Ibid*., para. 255.

leaders to trial rather than reviewing "evidence to make judgements regarding the involvement of particular individuals".[1864] By contrast, the Eritrea Commission indicated that it examined modes of liability when drawing up a confidential list of suspects.[1865]

Commissions' more abridged engagement with ICL stands in contrast to the approach taken by the Darfur Commission, which perhaps reflects the high-water mark in terms of ICL analysis by commissions of inquiry. The Commission wrote, "[t]o render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be suspected to be responsible, and the enumeration of the various modes of participation in international crimes under which the various persons may be suspected of bearing responsibility."[1866] It analysed elements of crimes and modes of liability in detail, specifying the number of state officials and members of armed groups it deemed responsible for international crimes pursuant to different modes of liability.[1867] Frulli writes that the Darfur Commission was a "watershed for prosecution oriented fact-finding".[1868]

Defences and mitigating circumstances were generally considered by earlier inquiries, particularly those on Yugoslavia, Rwanda, and Cambodia. These commissions discussed superior orders as a defence or mitigating circumstance,[1869] duress, mistake of fact,[1870] mental defect, and self-defence.[1871] The Yugoslavia Commission found that superior orders did not appear to be available on the facts but reiterated that individual cases "will have to be judged on their respective merits in accordance with the statute of the [ICTY]."[1872] The Cambodia Commission considered that the defence of mistake of law could not apply to "crimes that are so patently atrocious that such ignorance is never an excuse."[1873] More recent commissions considered the availability of certain defences, such as the Goldstone Commission's view that targeting errors could give rise to a mistake of fact which would negate the intent required for wilful killing.[1874] The Libya Commission did not consider defences at length, but noted that superior orders was not available for international crimes.[1875] The Guinea Commission stated that there could be no legal justification for acts of violence by Guinean security forces.[1876]

In examining criminal responsibility, commissions had limited engagement with principles of criminal law. They acknowledged the high standard of proof of 'beyond a reasonable doubt' necessary to secure criminal conviction and contrasted this with their lower standard of proof of 'reasonable grounds to believe'.[1877] Some commissions acknowledged the presumption of

[1864] *Cambodia Report*, *supra* note 324, para. 50. See also para. 80.
[1865] *Eritrea Second Report*, *supra* note 569, para. 332.
[1866] *Darfur Report*, *supra* note 32, para. 530.
[1867] *Ibid*., paras. 7, 123, 125, 533-557, and 558-564.
[1868] Frulli, *supra* note 102, at 1330.
[1869] *Yugoslavia Final Report*, *supra* note 39, para. 61 (as a defence); *Rwanda Final Report*, *supra* note 297, para. 175 and *Cambodia Report*, *supra* note 324, paras. 82-83 (as a mitigating circumstance).
[1870] *Rwanda Final Report*, *supra* note 297, para. 176.
[1871] *Cambodia Report*, *supra* note 324, para. 82.
[1872] *Yugoslavia Final Report*, *supra* note 39, para. 318.
[1873] *Cambodia Report*, *supra* note 324, para. 83.
[1874] *Goldstone Report*, *supra* note 633, para. 861.
[1875] *Libya Second Report*, *supra* note 853, para. 769.
[1876] *Guinea Report*, para. 198.
[1877] *CAR Report*, *supra* note 32, para. 16 and *Timor-Leste Report*, *supra* note 376, para. 110.

innocence[1878] and were concerned that their findings should not prejudice the fairness of future trials, in recognition of the rights of the accused.[1879] These principles are discussed further in Section 2.4.2, as they were also taken into account in deciding whether to identify suspects. By contrast, few commissions invoked the principle of legality. The Cambodia Commission is an exception; it identified legality as fundamental to criminal responsibility, writing, "[a]s affirmed at Nuremberg, leaders would be held to have known of the criminality of their acts vis-à-vis earlier Cambodian law or international law. These legal factors are relevant to our recommendations below regarding the appropriate targets of inquiry for any court."[1880] The Eritrea Commission also cited the *nullum crimen sine lege* principle when considering whether the crime against humanity of enforced disappearance existed prior to the Rome Statute.[1881] No commission invoked the principle of strict construction; however commissions did not generally refer to principles of interpretation, so such an omission is not unusual.[1882] Considering the frequency with which commissions made findings of international crimes, it is perhaps surprising that principles of criminal law were not referred to more often. However, such engagement might invite perceptions that inquiries are *de facto* criminal investigations.

2.4.2 Identification of suspected perpetrators

In evaluating responsibility for international crimes, UN atrocity inquiries considered whether to publicly identify suspected perpetrators.[1883] Many commissions were expressly mandated to identify perpetrators in pursuit of accountability.[1884] This function is not limited to commissions. In the truth commission context, 'naming names' has been seen as a truth-telling and accountability measure.[1885] For instance, the El Salvadorian truth commission determined that "the whole truth cannot be told without naming names".[1886] The *Principles Against Impunity* foresee the 'naming of names', providing that before truth commissions or commissions of inquiry do so, they must corroborate information and afford an opportunity for a right of reply.[1887] These stipulations reflect the fact that public naming can have serious

[1878] *Goldstone Report*, *supra* note 633, para. 25 and *HRC Burundi Detailed Report*, *supra* note 405, para. 705.
[1879] E.g., *Darfur Report*, *supra* note 32, para. 526 and *Libya Second Report*, *supra* note 853, para. 760.
[1880] *Cambodia Report*, *supra* note 324, para. 83.
[1881] *Eritrea Second Report*, *supra* note 569, para. 250.
[1882] A few commissions cited principles of interpretation when interpreting the Genocide Convention: *Yugoslavia Final Report*, *supra* note 39, paras. 88-95; *Rwanda Final Report*, *supra* note 297, paras. 157 and 164 and *Darfur Report*, *supra* note 32, para. 494.
[1883] Catherine Harwood and Carsten Stahn, 'What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility', *EJIL:Talk*, 11 November 2016, available at http://www.ejiltalk.org/whats-the-point-of-naming-names-in-international-inquiry-counseling-caution-in-the-turn-towards-individual-responsibility (accessed 1 May 2018).
[1884] E.g., *Guinea Mandate*, *supra* note 311; *Libya Mandate*, *supra* note 343; *Syria Mandate*, *supra* note 47; *HRC Burundi Mandate*, *supra* note 349; *Darfur Mandate*, *supra* note 303 and *CAR Mandate*, *supra* note 304.
[1885] Priscilla Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', (1994) 16(4) HRQ 597-655, at 647; Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America Symposium: Law and Lustration: Righting the Wrongs of the Past', (1995) 20(1) *Law and Social Inquiry* 79-116, at 105.
[1886] *From Madness to Hope: the 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador*, 1993, at 18, available at http://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf (accessed 1 May 2018).
[1887] *Principles Against Impunity*, *supra* note 54, Principle 9. See Alison Bisset, 'Principle 9. Guarantees for Persons Implicated', in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford: OUP, 2018) 123-128.

negative consequences; "[w]hile public identification is neither a criminal sanction nor a civil one, it can have negative effects on the reputation, career, and political prospects of individuals."[1888] Proponents advocate that a truth commission should identify suspected perpetrators, particularly where judicial accountability is unlikely, while critics argue that such practices threaten due process.[1889] Public identification has also occurred in the context of UN sanctions. Individuals suspected of being responsible for violations of IHL and IHRL have also been publicly identified by some expert groups assisting UN sanctions committees.[1890] In 2015, a high-level review of UN sanctions recommended that the names of individuals suspected of breaching sanctions or proposed for listing by expert groups should be conveyed in confidence and should not be included in public reports.[1891]

In the inquiry context, Grace observes that commissions have "differently weighed the aims of the mandate; the due process rights of the accused and the interests of victims, witnesses and the overall affected community."[1892] Interviews by HPCR indicate that fact-finding practitioners are also concerned about concrete consequences for named individuals.[1893] These considerations led to diverse inquiry practice relating to the identification of individuals.

At one end of the spectrum, a handful of commissions publicly identified individuals suspected of committing international crimes. The commissions on Libya and Côte d'Ivoire kept most individuals' names off the face of their public reports but did identify certain leaders by name.[1894] The Timor-Leste Commission publicly identified several individuals reasonably suspected of committing crimes under domestic law.[1895] The Guinea Commission identified three leaders, including the President, as suspected perpetrators but clarified that their involvement should be judicially examined;[1896] and six others whose involvement warranted further investigation.[1897] The Commission's decision to publicly name high-level suspects arguably made it easier to scrutinise whether Guinean authorities were investigating those 'most responsible', which in turn assisted the ICC Prosecutor's preliminary examination into Guinea. The ICC Prosecutor reported that the indictment of several named individuals indicated Guinea's genuine intention to prosecute those most responsible.[1898]

At the other end of the spectrum, some commissions did not identify suspected perpetrators either publicly or confidentially. For instance, the Sri Lanka Panel wrote that its mandate excluded individual liability and that further investigation would be required to identify those

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[1888] Popkin and Roht-Arriaza, *supra* note 1885, at 105.
[1889] E.g., Hayner, *supra* note 40, at 139 and Martin Imbleau, 'Initial Truth Establishment by Transitional Bodies and the Fight Against Denial', (2004) 15(1-2) *Criminal Law Forum* 159-192, at 186.
[1890] See, e.g., Larissa van den Herik, 'Peripheral hegemony in the quest to ensure Security Council accountability for its individualized UN sanctions regimes', (2014) 19(3) J Conflict & Sec L 427-449 [Van den Herik 2014].
[1891] *Compendium: High Level Review of United Nations Sanctions*, Recommendation 18, annexed to *Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General*, UN Docs. A/69/941-S/2015/432, 12 June 2015.
[1892] Grace 2015, *supra* note 59, at 52.
[1893] *Ibid*., at 51.
[1894] *Libya Second Report*, *supra* note 853, para. 760; *HRC Côte d'Ivoire Report*, *supra* note 810, para. 117.
[1895] *Timor-Leste Report*, *supra* note 376, paras. 113-134.
[1896] *Guinea Report*, *supra* note 39, paras. 215-243.
[1897] *Ibid*., para. 253.
[1898] ICC Prosecutor, 'Report on Preliminary Examination Activities 2013', para. 193, available at http://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx#guinea (accessed 1 May 2018).

responsible and assess *mens rea*.[1899] Some commissions linked their decision not to identify individuals with the presumption of innocence and their low standard of proof.[1900] For instance, the Gaza Commission wrote that "[a]s the 'reasonable ground' threshold is lower than the standard required in criminal trials, the commission does not make any conclusions with regard to the responsibility of specific individuals".[1901]

In an intermediate approach, several commissions identified suspects confidentially in documents handed to the High Commissioner for Human Rights or the Secretary-General, depending on the mandating authority,[1902] for use by competent authorities. These commissions favoured confidentiality to protect the presumption of innocence, safeguard due process and protect witnesses and victims.[1903] The Syria Commission adopted this intermediate approach because it deemed its methodology as not meeting "normal requirements of due process".[1904] However, after investigating for four years, the Commission signalled a potential change, writing that "not to publish names at this juncture… would be to reinforce the impunity that the Commission was mandated to combat."[1905] The Commission wrote that it should interpret its mandate to give effect to the right to truth and that "putting alleged perpetrators on notice will serve to maximize the potential deterrent effect".[1906] At the time of writing, the Commission had not published such information, but had shared information with states willing to exercise national jurisdiction over crimes committed in Syria.[1907] The Commission also signalled its readiness to share information with states willing to exercise universal jurisdiction over suspected perpetrators.[1908] The Commission shares information with the IIIM, which will in turn share information with competent authorities.[1909]

Some commissions drew up simple lists of suspects[1910] while others compiled files of evidence against individuals.[1911] Some commissions also established databases of crime base information which could be transferred to competent authorities. For instance, the Yugoslavia Commission created a database of war crimes which was transferred to ICTY's Office of the Prosecutor.[1912] The CAR Commission likewise compiled a database of all known incidents of human rights and IHL violations[1913] which was submitted to the Secretary-General along with

[1899] *Sri Lanka Report*, *supra* note 29, para. 244.
[1900] *Goldstone Report*, *supra* note 633, para. 25.
[1901] *Gaza Report*, *supra* note 766, para. 20.
[1902] *HRC Côte d'Ivoire Report*, *supra* note 810, para. 118; *Libya Second Report*, *supra* note 853, para. 760 and *Syria Third Report*, *supra* note 564, para. 131.
[1903] *Darfur Report*, *supra* note 32, paras. 526-529; *HRC Burundi Detailed Report*, *supra* note 405, para. 705 and *Libya Second Report*, *supra* note 853, para. 760.
[1904] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/28/69, 5 February 2015. para. 140 [*Syria Ninth Report*].
[1905] *Ibid.*, para. 140.
[1906] *Ibid.*, para. 141.
[1907] *Ibid.*, para. 106.
[1908] *Ibid.*, para. 107.
[1909] *IIIM Mandate*, *supra* note 330, para. 4; *IIIM Report*, *supra* note 335, para. 41.
[1910] *Darfur Report*, *supra* note 32, para. 526; United Nations, 'Secretary-General gives list of Darfur war crimes suspects to international court', 5 April 2005, available at http://www.un.org/apps/news/story.asp?NewsID=13871#.WfM7D4N9670 (accessed 1 May 2018).
[1911] *Eritrea Second Report*, *supra* note 569, paras. 332- 333; *CAR Report*, *supra* note 32, para. 24.
[1912] *Yugoslavia Final Report*, *supra* note 39, paras.21-22.
[1913] *CAR Report*, *supra* note 32, para. 14.

a list of suspects.[1914] The Syria Commission deposited with the High Commissioner for Human Rights "a comprehensive database containing all evidence"[1915] which may be disclosed to competent authorities.

Another approach which may indirectly identify individuals, especially those in leadership positions, is to name military units or state institutions implicated in serious violations.[1916] For instance, the Darfur Commission identified military groups which should be criminally investigated.[1917] The North Korea Commission identified state institutions implicated in crimes against humanity.[1918] The South Sudan Commission identified individuals by military rank, though not by name.[1919] Some commissions additionally wrote to heads of state, warning of their potential responsibilities for international crimes, including on the basis of superior responsibility.[1920] Such letters have more than symbolic value. By publicly placing individuals in leadership positions on notice, they might evince their knowledge of international crimes and their ongoing failure to prevent and punish them, relevant to superior responsibility.[1921]

2.5 Concluding observations

Commissions engaged with responsibility regimes to differing extents with respect different types of actors. They focussed on the responsibilities of states, organised armed groups, and individuals. We also see some selectivity with respect to *which* states were under scrutiny. States with territorial jurisdiction or effective control over situations of concern received the lion's share of attention. Commissions did have some regard to third states' involvement in situations of atrocities but did not always frame them as violations attracting responsibility. This was particularly the case for states' provision of arms and other forms of support to armed groups. While such actions might violate the principle of non-intervention,[1922] commissions did not usually invoke this norm. The focus on concerned states corresponds to the mandating authority's intention to limit scrutiny to the situation of immediate concern. For instance, in observing that the Libya Commission focussed on the actions of Libya rather than other states, Heller writes:[1923]

> The [HRC] created the Commission to focus on the crimes of the Qadhafi government, and that is exactly what it did – even if not with the single-minded focus that the Council intended. That partiality in no way discredits the Commission's work; its

[1914] *CAR Report*, *supra* note 32, para. 24.
[1915] *Syria Second Report*, *supra* note 1109, para. 88.
[1916] E.g., *HRC Burundi Detailed Report*, *supra* note 405, para. 705; *Syria Second Report*, *supra* note 1109, para. 87.
[1917] *Darfur Report*, *supra* note 32, para. 532.
[1918] *North Korea Report*, *supra* note 32, para. 1193.
[1919] *South Sudan Second Report*, *supra* note 31, para. 33: "eight Lieutenant Generals, 17 Major Generals, eight Brigadier Generals, five Colonels and three State Governors".
[1920] E.g., *Letter from Michael Kirby to Kim Jong Un, Supreme Leader of the DPRK, 20 January 2014*, in *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63, at 23 and 25 and *Letter dated 7 June 2016 transmitting an advance edited version of the report of the Commission of Inquiry to President Isaias Afwerki*, in UN Doc. A/HRC/32/CRP.1, Annex III, at 91.
[1921] Rome Statute, *supra* note 1033, Art. 28.
[1922] UN Charter, Art. 2(1); *Nicaragua Case*, *supra* note 1352, paras. 212 and 241.
[1923] Heller, *supra* note 96, at 51.

> reports provide the most detailed and compelling account of the Libyan conflict to date. But it serves as a stark reminder that even the most seemingly independent and impartial international commission of inquiry can never escape politics completely.

Commissions generally gave less attention to responsibilities of international organisations and corporate entities. This difference in focus perhaps reflects the more truncated or nebulous normative framework governing those entities, and a lack of mechanisms available to enforce those obligations. Commissions have however addressed these actors in recommendations.

Almost all commissions examined international crimes to some extent, with a few inquiries exclusively focussing on individual responsibility. There was significant variance in commissions' engagement with different aspects of the ICL framework. Some identified species of crimes while others went further to identify contextual elements, elements of crimes, modes of liability and even defences. Such details distinguish criminal responsibility from other responsibility regimes. It may be queried to what extent is it useful for commissions to assess these more detailed elements, especially where perpetrators are unknown. As recognised by many commissions, their mandate is not to conclusively determine criminal liability. To carry out detailed assessments might duplicate or even contradict the work of a judicial body. Yet to omit these details might wrongly imply that international crimes are conceptually identical to serious violations of IHL or IHRL. It might be beneficial for commissions to acknowledge elements of criminal responsibility and articulate the extent to which they were assessed when reaching findings of crimes. Such an approach is reflected where commissions assessed objective elements and recalled that *mens rea* would also need to be satisfied to attach criminal responsibility and where they identified potential modes of liability. Such approaches have synergies with the authorization of investigations at the ICC. The Pre-Trial Chamber must be satisfied that there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".[1924] When authorising investigations, Pre-Trial Chambers have decided that in light of the stage of the proceedings and because there was no suspect before the Court, they could not assess the mental elements, and focused on the physical elements of crimes against humanity.[1925] Such an approach might similarly allow commissions to make findings in respect of the relevant crime base while articulating the complexity of the ICL framework.

Commissions took different views as to whether to publicly name suspected perpetrators. Potential benefits include upholding a moral dimension to accountability, especially where legal avenues for prosecution appear elusive; or alternatively guiding the focus of criminal proceedings before the ICC or pursuant to universal jurisdiction. There may even be some deterrent value, should public naming become a standard practice of UN atrocity inquires. However, commissions frequently positioned their findings of responsibility as part of a broader accountability process. Viewed in this light, contemporary commissions' practice of publicly identifying implicated institutions and listing suspects confidentially strikes a balance

[1924] Rome Statute, *supra* note 1033, Art. 53(1)(a).

[1925] *Situation in the Republic of Burundi*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, PTC III, 25 October 2017, footnote 43 [*Burundi Investigation Decision*] and *Kenya Investigation Decision*, *supra* note 1682, paras. 79 and 140.

in respect of different interests, including denunciation, assistance to future accountability mechanisms, and concerns around procedural fairness and witness protection.

3. Accountability Recommendations

This Section discusses different accountability measures recommended by commissions, namely prosecutions of international crimes (3.1), restitution and compensation (3.2), truth-seeking (3.3), other measures of satisfaction (3.4) and guarantees of non-repetition (3.5). This structure loosely reflects the categories of remedies for serious violations of IHRL and IHL reflected in the General Assembly's *Principles on the Right to a Remedy*. This structure was chosen in light of commissions' frequent invocation of this instrument; the immediate relevance of enumerated remedies for the harms at issue; and the fact that the *Principles* depart in key respects from the general reparations regime articulated in the *Articles on State Responsibility*. This Section concludes by offering general observations as to commissions' approaches in respect of recommending accountability measures and mechanisms (3.6).

3.1 Prosecutions of international crimes

Commissions identified a duty under customary international law for states to investigate and prosecute international crimes.[1926] The North Korea Commission depicted the duty to prosecute crimes against humanity as a peremptory norm.[1927] Some commissions linked the duty to investigate and prosecute with the right to a remedy and the 'Responsibility to Protect' (R2P) principle, which is elaborated upon in Section 3.4.[1928] Commissions depicted prosecutions of international crimes as imperative to foster compliance with international law. Some commissions also linked prosecutions with general deterrence of violations.[1929] The Darfur Commission wrote that determining criminal responsibility "is a critical aspect of the enforceability of rights and of protection against their violation."[1930] Most recommendations to prosecute were directed at states or UN bodies which could establish criminal justice mechanisms, notably the Security Council. A few commissions also identified an obligation to investigate and prosecute on the part of non-state actors with government-like functions.[1931]

Commissions consistently rejected claims that criminal justice might endanger reconciliation or peace-building, arguing that reconciliation "can never be achieved without truth and justice".[1932] The South Sudan Commission remarked that some voices calling for peace-building to take precedence hoped that justice would be prevented, rather than delayed.[1933] Commissions opposed the use of amnesties for international crimes as part of peace negotiations or truth-seeking processes.[1934] However, they took different views as to whether

[1926] E.g., *CAR Report*, *supra* note 32, para. 81; *Libya Second Report*, *supra* note 853, para. 769.
[1927] *North Korea Report*, *supra* note 32, footnote 1672.
[1928] E.g., *North Korea Report*, *supra* note 32, para. 1210; *Gaza Flotilla Report*, *supra* note 681, para. 258; *Darfur High-Level Report*, *supra* note 1027, paras. 76 and 77(a).
[1929] E.g., *Beit Hanoun Report*, *supra* note 620, para. 80; *Goldstone Report*, *supra* note 633, para. 1966.
[1930] *Darfur Report*, *supra* note 32, para. 407.
[1931] *Goldstone Report*, *supra* note 633, paras. 1836 and 1843; *Gaza Report*, *supra* note 766, para. 666; *Libya First Report*, *supra* note 968, para. 62.
[1932] *South Sudan First Report*, *supra* note 30, para. 80. See *Cambodia Report*, *supra* note 324, paras. 2-3 and *Yugoslavia Final Report*, *supra* note 39, para. 320.
[1933] *South Sudan First Report*, *supra* note 30, para. 80.
[1934] *North Korea Report*, *supra* note 32, para. 1202 (3); *Darfur Report*, *supra* note 32, para. 618; *CAR Report*, *supra* note 32, paras. 32-35.

prosecutions should be comprehensive or selective. The CAR Commission considered that impunity would not be avoided by prosecuting a "handful of perpetrators"; rather, as many as possible should be prosecuted.[1935] By contrast, the Cambodia Commission considered that because "a reopening of the events through criminal trials on a massive scale" would impede reconciliation,[1936] prosecutions should only be pursued against those "most responsible".[1937]

Rather than simply advocating that international crimes be prosecuted, many commissions also suggested appropriate venues, taking into account the needs of concerned states, community interests, costs, and feasibility. For instance, while recognising benefits of local trials, such as access to evidence and responsiveness to the needs of local communities, the Rwanda Commission favoured an international tribunal to guarantee independence and impartiality in light of the emotionally and politically-charged nature of the crimes and because their gravity was of concern to the international community as a whole.[1938] The Cambodia Commission also opposed local trials due to security concerns and corruption.[1939] It recommended that an *ad hoc* tribunal be established by the Security Council or the General Assembly.[1940]

After the Rome Statute's entry into force, several commissions recommended the ICC as a venue, with jurisdiction to be triggered by the Security Council if necessary.[1941] For instance, the Darfur Commission preferred the ICC as the most appropriate venue due to the nature of the crimes, the authority of suspected perpetrators, the ICC's authority and impartiality, and considerations of delay and cost associated with *ad hoc* tribunals.[1942] The Syria Commission similarly discussed the merits of different judicial avenues, comparing the ICC favourably with local trials or an *ad hoc* tribunal.[1943] Other commissions adopted a tandem approach, suggesting some prosecutions could be pursued at the ICC while others would take place in national courts[1944] or before hybrid or regional bodies. For instance, the Eritrea Commission recommended that in addition to an ICC referral, the AU should establish a mechanism to prosecute crimes against humanity.[1945] The CAR Commission considered that the CAR's Special Criminal Court should deal with the bulk of criminal cases, while the ICC could deal with more controversial or serious crimes.[1946] Recommendations for modalities of prosecutions generally tracked the proliferation of international criminal tribunals. The implementation of such recommendations is another matter, discussed in Section 4.1.

[1935] E.g., *CAR Report*, *supra* note 32, para. 81.
[1936] *Cambodia Report*, *supra* note 324, para. 106.
[1937] *Ibid*., para. 110.
[1938] *Rwanda Interim Report*, *supra* note 298, paras. 134, 136 and 138.
[1939] *Cambodia Report*, *supra* note 324, paras. 126-130.
[1940] *Ibid*., para. 148.
[1941] E.g., *Goldstone Report*, *supra* note 633, paras. 1969(b)-(e); *North Korea Report*, *supra* note 32, para. 1225(a); *Eritrea Second Report*, *supra* note 569, para. 361(b); *Guinea Report*, *supra* note 39, paras. 266 and 278.
[1942] *Darfur Report*, *supra* note 32, paras. 573-582.
[1943] *Syria Fourth Report*, *supra* note 1097, Annex XIV.
[1944] *Darfur High-Level Report*, *supra* note 1027, para. 77(k); *Goldstone Report*, *supra* note 633, paras. 1969(c) and (e); *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 127; *Eritrea Second Report*, *supra* note 569, para. 363(f).
[1945] *Eritrea Second Report*, *supra* note 569, para. 362.
[1946] *CAR Report*, *supra* note 32, para. 71.

Some commissions proposed follow-up mechanisms to facilitate investigations and prosecutions. For instance, the Goldstone Commission recommended that a follow-up committee report on parties' fulfilment of their duties to investigate and prosecute. It directed this proposal to the Security Council, recommending that if prosecutions did not materialise, the situation should be referred to the ICC.[1947] Ultimately, the HRC established such a committee,[1948] which found little evidence of accountability action.[1949] The HRC requested the Secretary-General to continue to report on progress[1950] and eventually, its attention shifted to other crises. While the follow-up committee did not motivate the parties to act, Daragh Murray writes that it usefully "specified a framework for monitoring and assessing criminal investigations."[1951] The North Korea Commission's proposal that OHCHR establish a field-based structure to help to ensure accountability, including by collecting evidence,[1952] led to the establishment of an OHCHR field office at Seoul.[1953] The HRC also established a group of experts to explore ways to secure accountability in the DPRK.[1954] The Eritrea Commission similarly proposed an OHCHR structure to promote accountability,[1955] but the HRC instead renewed the mandate of the Special Rapporteur on Eritrea to report on implementation of its recommendations.[1956]

3.2 Restitution and compensation

Restitution and compensation are well-known remedies in the field of state responsibility.[1957] The right of victims of serious IHL and IHRL violations to reparation is affirmed in several instruments,[1958] although scholars disagree as to whether such a right is fully recognised as a matter of international law.[1959] The *Principles on the Right to a Remedy* provide that full reparation for serious violations of IHRL and IHL includes restitution and compensation.[1960]

[1947] *Goldstone Report*, *supra* note 633, paras. 1969(b)-(e).
[1948] HRC Res. 13/9, 25 March 2010, para. 9.
[1949] *Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9*, UN Doc. A/HRC/15/50, 23 September 2010 and UN Doc. A/HRC/16/24, 5 May 2011.
[1950] HRC Res. 19/18, 22 March 2012; *Report of the Secretary-General: Progress made in the implementation of the recommendations of the Fact-Finding Mission by all concerned parties, including United Nations bodies*, UN Doc. A/HRC/21/33, 21 September 2012.
[1951] Daragh Murray, 'Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring of the 'Goldstone Process'', in Chantal Meloni and Gianni Tognoni (eds.), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 145-160, at 160.
[1952] *North Korea Report*, *supra* note 32, para. 1225(c).
[1953] HRC Res. 25/25, para. 10 and OHCHR, 'UN Human Rights Chief opens new office in Seoul', 26 June 2015, available at http://www.ohchr.org/EN/NewsEvents/Pages/UNHRChiefopensnewofficeinSeoul.aspx (accessed 1 May 2018).
[1954] Group of Independent Experts on Accountability on the situation of human rights in the DPRK, established by HRC Res. 31/18, 23 March 2016, para. 11.
[1955] *Eritrea Second Report*, *supra* note 569, para. 358(e).
[1956] HRC Res. 32/24; *Report of the Special Rapporteur on the situation of human rights in Eritrea, Sheila B. Keetharuth*, UN Doc. A/HRC/35/39, 7 June 2017.
[1957] ARSIWA, *supra* note 1791, Art. 36.
[1958] ICCPR, *supra* note 243, Arts. 3, 9(5) and 14(6); CAT, *supra* note 780, Art. 14; CERD, *supra* note 1179, Art. 6; CRC, *supra* note 1179, Art. 39; International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3, Art. 24(4); *Principles on the Right to a Remedy*, *supra* note 540; *Principles Against Impunity*, *supra* note 54.
[1959] E.g., Christian Tomuschat, 'Darfur – Compensation for the Victims', (2005) 3 JICJ 579-589 at 587 *contra* Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?', (2010) 8(1) JICJ 79-111, at 85.
[1960] *Principles on the Right to a Remedy*, *supra* note 540, Principle 18.

This Section discusses commissions' recommendations for restitution and compensation directed at states (3.2.1) and other actors, particularly international organisations, armed groups and individuals (3.2.2).

3.2.1 Recommendations to states

Several commissions linked the duty to provide reparations pursuant to the rules of state responsibility with victims' rights to a remedy[1961] and the need for reparations to be victim-centred.[1962] Commissions' recommendations reflected these different elements. The Guinea Commission recommended that Guinea provide healthcare and symbolic reparations as well as financial compensation.[1963] The Syria Commission recommended that Syria establish a reparation fund "for victims of serious human rights violations."[1964] The Palmer Commission not style its recommendations as in pursuit of accountability for legal violations, but recommended that Israel "offer payment for the benefit of the deceased and injured victims and their families, to be administered by [Turkey and Israel] through a joint trust fund".[1965]

Some commissions recommended that the international community assist concerned states meet their obligations in light of their precarious financial situations.[1966] The CAR Commission proposed that the CAR and Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) adopt a policy to restore property rights of those forced to flee from violence, and if this was not possible, "a comprehensive program of compensation should be put in place, along with appropriate grievance mechanisms."[1967] Several commissions proposed that UN bodies should establish compensation mechanisms. The Darfur Commission made a detailed proposal for an international compensation commission[1968] which was not adopted by the Security Council.[1969] The Lebanon Commission recommended that the HRC consider creating "a commission competent to examine individual claims"[1970] and establish a "follow-up procedure on the measures to be taken, notably for the rebuilding of Lebanon and above all reparations for victims".[1971] The HRC asked OHCHR to consult with Lebanon on the recommendations;[1972] ultimately, no such mechanism was established.[1973] The Goldstone Commission recommended that the General Assembly establish an escrow fund to pay compensation to Palestinian victims, and that Israel should pay into that fund.[1974] In making this proposal, the Commission cited the inquiries on

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[1961] *East Timor Report*, *supra* note 338, para. 148; *Goldstone Report*, *supra* note 633, paras. 1861-1864; *Sri Lanka Report*, *supra* note 29, para. 276; *Libya Second Report*, *supra* note 853, paras. 765-766.
[1962] *Sri Lanka Report*, *supra* note 29, para. 276.
[1963] *Guinea Report*, *supra* note 39, para. 270.
[1964] *Syria First Report*, *supra* note 32, para. 112(l).
[1965] *Palmer Report*, *supra* note 316, para. 169. See Palmer, *supra* note 480, at 605.
[1966] E.g., *Abidjan Report*, *supra* note 43, para. 91; *Guinea Report*, *supra* note 39, paras. 271 and 279; *Syria Second Report*, *supra* note 1109, para. 138.
[1967] *CAR Report*, *supra* note 32, Recommendation 2(a).
[1968] *Darfur Report*, *supra* note 32, para. 590.
[1969] SC Res. 1593 (2005), para. 5 encouraged the creation of "institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes".
[1970] *Lebanon Report*, *supra* note 855, para. 31(n).
[1971] *Ibid*., para. 31(e).
[1972] HRC Res. 3/3, 8 December 2006, para. 2.
[1973] *Report of the UN High Commissioner for Human Rights on the follow-up to the report of the Commission of Inquiry on Lebanon*, UN Doc. A/HRC/5/9, 4 June 2007, para. 47.
[1974] *Goldstone Report*, *supra* note 633, para. 1971(b).

Darfur and Lebanon as having expressed similar concern that the international community must provide compensation where recourse from concerned states was unlikely.[1975] While the HRC recommended that OHCHR explore modalities for an escrow fund, this was not established.[1976] None of these recommendations bore fruit.

3.2.2 Recommendations to other actors

While the ILC has identified a duty to provide reparation for internationally wrongful acts on the part of international organisations,[1977] such obligations were not much discussed in inquiry reports. Some commissions addressed compensatory recommendations to these actors but did not always link them to legal liability. For instance, the Libya Commission recommended that NATO apply its non-binding guidelines on payments for civilian losses, where payments are provided "without reference to the question of legal liability."[1978] These guidelines were formulated for the International Security Assistance Force in Afghanistan. NATO opposed this recommendation, writing that since damages were not owed for harm caused by lawful military operations and it was not standard practice to provide compensation programmes in such cases, questions of compensation were "of a political character."[1979] It does not appear that NATO applied its guidelines on *ex gratia* payments to its activities in Libya.

The CAR Commission examined violations by international peacekeeping forces, finding that existing inquiry and reporting arrangements "[fail] to satisfy the rights of the family members of the victims to an effective remedy."[1980] It recommended that the Security Council establish a mechanism to hear complaints of IHRL violations by peacekeeping forces[1981] similar to the Human Rights Advisory Panel (HRAP), which could hear complaints of violations allegedly attributable to the United Nations Mission in Kosovo (UNMIK) and recommend redress, including compensation.[1982] As UNMIK did not implement HRAP's recommendations,[1983] its utility may be queried. Nonetheless, both the Libya Commission and the CAR Commission sought to address concerns regarding accountability of peacekeeping missions by suggesting measures which had previously attracted political support.[1984]

[1975] *Ibid*., para. 1873.

[1976] HRC Res. 16/32, 25 March 2011, para. 6; *Report of the United Nations High Commissioner for Human Rights on follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/15/52/Add.1, 11 October 2010; *Progress report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution 16/32*, UN Doc. A/HRC/18/50, 11 August 2011 and *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1*, A/HRC/31/40/Add.1, 7 March 2016, paras. 15 and 55.

[1977] DARIO, *supra* note 14, Art. 31.

[1978] *Libya Second Report*, *supra* note 853, para. 130(b); *NATO Guidelines*, *supra* note 1820, Guideline 9.

[1979] *NATO letter 15 February 2012*, *supra* note 997, at 2-3.

[1980] *CAR Report*, *supra* note 32, para. 574.

[1981] *Ibid*., Recommendation 4(f).

[1982] Human Rights Advisory Panel, established by UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, UN Doc. UNMIK/REG/2006/12, 23 March 2006.

[1983] *Human Rights Advisory Panel History and Legacy, Kosovo, 2007-2016, Final Report*, 30 June 2016, para. 241: "the biggest failure of the entire HRAP experience was the fact that UNMIK did not follow the Panel's recommendations."

[1984] *Ibid*., paras. 4-5 and SC Res. 2272 (2016).

Turning to *de facto* regimes and armed groups, commissions generally invoked obligations to provide compensation in respect of actors with state-like characteristics. In contrast to the multifaceted reparatory recommendations directed to states, commissions' recommendations to non-state actors were less detailed. While the Goldstone Commission recommended that Israel pay compensation, it did not make a reciprocal recommendation to the Palestinian side.[1985] The Gaza Commission did not specifically identify a duty on the part of Hamas to provide compensation, but generally called upon "all parties" to establish accountability mechanisms, noting that victims' right to a remedy "including full reparations, must be ensured without further delay."[1986] The Libya Commission considered in its first report that the National Transitional Council (NTC) exercised "*de facto* control over territory akin to that of a Governmental authority"[1987] and recommended that it grant reparations to victims.[1988] In its second report, the Commission noted that the NTC was recognised as the interim Government, so treated it as the state.[1989]

The Darfur Commission took the view that compensation may also be owed by armed groups without state-like characteristics, writing that serious violations invoked the international responsibility of "the international non-state entity to which those authors belong as officials", so that the "non-state-entity may have to pay compensation to the victims".[1990] The Commission sourced this duty in the Hague Regulations and grave breaches provisions of the Geneva Conventions and Additional Protocol I.[1991] Noting that these obligations were originally owed between states, the Commission observed that an individual right to a remedy had since emerged from human rights doctrines.[1992] It concluded that Sudan was obliged to pay compensation for crimes perpetrated by its agents or *de facto* organs, and that a "similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished."[1993] The Commission envisaged that rebels' violations should be compensated through a trust fund, to be funded by international voluntary contributions.[1994] This proposal arguably reflects the principle in the *Principles on the Right to a Remedy* that states must provide reparations where "parties liable for the harm suffered are unable or unwilling to meet their obligation".[1995]

Commissions more commonly addressed responsibilities of armed groups indirectly via investigation and prosecution of their individual members. As noted by Zegveld, international bodies have "largely ignored the accountability of the groups in favour of the accountability

[1985] *Goldstone Report*, *supra* note 633, para. 1843.
[1986] *Gaza Report*, *supra* note 766, para. 677.
[1987] *Libya First Report*, *supra* note 968, para. 62.
[1988] *Ibid*., para. 259(c).
[1989] *Libya Second Report*, *supra* note 853, para. 30.
[1990] *Darfur Report*, *supra* note 32, para. 175.
[1991] *Ibid*., footnote 213.
[1992] *Ibid*., paras. 595-597.
[1993] *Ibid*., para. 600.
[1994] *Ibid*., para. 603.
[1995] *Principles on the Right to a Remedy*, *supra* note 540, Principle 16. See Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda', in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill, 2015) 323-346, at 331.

of individual members."[1996] This lack of attention reflects a constellation of difficulties, including uncertainty regarding applicable primary rules, underdeveloped rules governing responsibility, a lack of forums in which to seek recourse, and practical impediments such as the absence of collectively held assets.[1997] Luke Moffett argues that responsibility of armed groups should not be modelled on state responsibility due to their wide diversity, and proposes a "third type of responsibility" that rests collectively on the members of an impugned group.[1998] Such a possibility was raised in the report of the Darfur Commission.

Finally, commissions infrequently recognised an obligation to provide compensation on the part of convicted individuals. The Darfur Commission observed "a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury",[1999] citing the Rome Statute and international declarations. The Cambodia Commission considered that the wealth of convicted Khmer Rouge leaders should be given as reparations to victims of the regime, observing that this measure was recognised at the ICC and *ad hoc* tribunals.[2000] The Commission recommended convicted leaders should pay from their own wealth or otherwise through a "special trust fund", and that states holding Khmer Rouge assets should arrange their transfer to meet defendants' obligations.[2001] Most commissions did not expressly link the obligation to provide reparations to criminal conviction, perhaps because enforcement regimes vary across jurisdictions.

3.3 Truth-seeking measures

The right to the truth in respect of serious violations of IHRL and IHL has been recognised by the General Assembly,[2002] the HRC,[2003] certain international judicial bodies,[2004] and in some academic writings.[2005] The *Principles on the Right to a Remedy* frame truth-seeking measures as a means of satisfaction.[2006] Inquiry reports depict truth-seeking as essential for accountability and complementary to prosecutions;[2007] however they engaged with the modalities of such mechanisms to differing extents.

Some commissions identified the need for a truth-seeking process but left the modalities of such processes open. The CAR Commission considered it important to produce a detailed

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[1996] Zegveld 2002, *supra* note 1249, at 223.
[1997] Matthew Happold, 'Protecting Children in Armed Conflict: Harnessing the Security Council's "Soft Power"', (2010) 43 Isr L Rev 360-380, at 374.
[1998] Moffett, *supra* note 1995, at 332.
[1999] *Darfur Report*, *supra* note 32, footnote 217.
[2000] *Cambodia Report*, *supra* note 324, para. 212. E.g., Rome Statute, *supra* note 1033, Art. 75; ICTY Statute, Art. 24(3) and ICTR Statute, Art. 23(3).
[2001] *Cambodia Report*, *supra* note 324, para. 212.
[2002] GA Res. 68/165, para. 1.
[2003] HRC Res. 21/7, para. 1.
[2004] *Almonacid-Arellano*, *supra* note 553, paras. 129 and 150.
[2005] E.g., Théo Boutruche, 'Seeking the Truth About Serious Human Rights and Humanitarian Law Violations: The Various Facets of a Cardinal Notion of Transitional Justice', in Marielle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: TMC Asser Press, 2013) 339-375; Yasmin Navqi, 'The right to the Truth in International Law: Fact or Fiction?', (2006) 88(862) IRRC 245-273 and Merryl Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice', (2015) 64(1) ICLQ 141-177.
[2006] *Principles on the Right to a Remedy*, *supra* note 540, Principle 22(b).
[2007] E.g., *Sri Lanka Report*, *supra* note 29, at 285 and 429; *Guinea Report*, *supra* note 39, para. 210; *Darfur Report*, *supra* note 32, para. 624.

account of violations and permit victims to tell their stories in light of the reality that many crimes would go unpunished.[2008] It recommended that the Government invite the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to recommend the most effective truth-seeking strategy in the circumstances.[2009] The Sri Lanka Panel recommended that Sri Lanka initiate a process to examine the root causes and conduct of the conflict, patterns of violations and institutional responsibilities,[2010] and to acknowledge its role and responsibility for civilian casualties.[2011] The Syria Commission identified "investigation panels, documentation of violations or the securing of archives"[2012] as possible measures in addition to truth commissions as ways to realise the right to truth.

A few commissions recommended the establishment of truth commissions.[2013] The Darfur Commission identified the added value of such a mechanism: "[c]riminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt."[2014] Conversely, other commissions were less confident about the utility of truth commissions in situations under investigation. The Cambodia Commission warned that a truth commission might not be appropriate in the near future due to enduring divisions in Cambodia that could frustrate its work, and also cautioned the simultaneous operation of a truth commission and a judicial body, as it could create public confusion and lead to difficulties for the fair conduct of trials.[2015] The Eritrea Commission stated that a truth commission would not be "a viable option in the current circumstances",[2016] but did not explain why. It recommended that the Government provide victims with redress, "including the right to truth",[2017] but did not elaborate as to how this right should be realised. The North Korea Commission considered that a truth commission which would allow amnesties in exchange for truth to be "eminently unsuitable to a situation where crimes against humanity are being committed unabated."[2018] It indicated that truth-seeking measures might be possible after "profound political and institutional reforms within the DPRK".[2019]

3.4 Other measures of satisfaction

The *Principles on the Right to a Remedy* provide that in addition to compensation and restitution, measures of satisfaction may be required to remedy serious violations of IHRL and IHL. In this respect, the *Principles* depart from general rules of state responsibility, whereby satisfaction is secondary to other forms of reparation.[2020] In this context, satisfaction includes

[2008] *CAR Report*, *supra* note 32, Recommendation 1(c).
[2009] Ibid.
[2010] *Sri Lanka Report*, *supra* note 29, Recommendation 3A.
[2011] *Ibid*., Recommendation 3B.
[2012] *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 128.
[2013] E.g., *Abidjan Report*, *supra* note 43, para. 90(d).
[2014] *Darfur Report*, *supra* note 32, para. 617.
[2015] *Cambodia Report*, *supra* note 324, para. 203.
[2016] *Eritrea Second Report*, *supra* note 569, para. 338.
[2017] *Ibid*., para. 357(a).
[2018] *North Korea Report*, *supra* note 32, para. 1202(3).
[2019] *North Korea Report*, *supra* note 32, para. 1203.
[2020] ARSIWA, *supra* note 1791, Art. 37 (1).

cessation of ongoing violations, public apology, judicial and administrative sanctions against perpetrators, and commemorations to victims, as well as truth-seeking measures.[2021]

Several commissions recognised satisfaction measures as components of reparations.[2022] For instance, the Beit Hanoun Commission recommended that Israel offer "a memorial to the victims that constitutes a response to the needs of survivors",[2023] such as a physiotherapy clinic. While the Palmer Commission disconnected recommendations from legal liability, some resembled satisfaction, such as the proposal that Israel offer an "appropriate statement of regret… in respect of the incident in light of its consequences".[2024] The Timor-Leste Commission recommended a national reparations programme to award measures including acknowledgement of wrongdoing, public disclosure of events and rehabilitation.[2025]

Lustration and vetting were also recommended to remove individuals who had participated in violations from public authority and prevent them from holding public office to "(re-)establish civic trust and (re-)legitimize public institutions".[2026] Lustration refers to the policy to remove implicated personnel, while vetting is the process by which the policy is implemented.[2027] The Cambodia Commission recommended that those convicted of international crimes be precluded from public office.[2028] The CAR Commission recommended that candidates for national political office must attest that they were not implicated in serious violations.[2029] Other commissions advocated that those allegedly responsible for serious violations of IHRL or IHL be removed from security, military, and judicial institutions.[2030] The UN also conducts a screening process for all UN personnel to exclude perpetrators of serious criminal offences and those involved in the commission of violations of IHRL or IHL.[2031]

Several commissions recommended that sanctions be applied against suspects in leadership roles who were implicated in atrocities as a way to end ongoing violations.[2032] For instance, the HRC's Burundi Commission recommended that UN member states institute sanctions against those suspected of committing serious violations of IHRL and international crimes in the absence of improvement in the human rights situation.[2033] As noted by Van den Herik, originally "UN sanctions were conceived of as political measures addressing a determined

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[2021] *Principles on the Right to a Remedy*, *supra* note 540, Principle 22.
[2022] E.g., *Gaza Report*, *supra* note 766, para. 606; *Sri Lanka Report*, *supra* note 29, para. 266; *Goldstone Report*, *supra* note 633, para. 1866.
[2023] *Beit Hanoun Report*, *supra* note 620, para. 78.
[2024] *Palmer Report*, *supra* note 316, para. 169. See Orakhelashvili, *supra* note 1165, at 133.
[2025] *Timor-Leste Report*, *supra* note 376, para. 217.
[2026] OHCHR, *Rule of law tools for post-conflict states: Vetting: An operational framework*, UN Doc. HR/PUB/06/5 (2006) at 4, available at http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf (accessed 1 May 2018).
[2027] US Department of State, 'Transitional Justice Initiative: Lustration and Vetting', available at http://www.state.gov/documents/organization/257775.pdf (accessed 1 May 2018).
[2028] *Cambodia Report*, *supra* note 324, para. 210.
[2029] *CAR Report*, *supra* note 32, para. 27, Recommendation 1(d).
[2030] E.g., *Libya Second Report*, *supra* note 853, para. 127(q); *Syria Second Report*, *supra* note 1109, para. 136; *North Korea Report*, *supra* note 32, para. 1220(a).
[2031] United Nations, *Human Rights Screening of United Nations Personnel*, 11 December 2012, available at http://police.un.org/sites/default/files/policy_on_human_rights_screening_of_un_personnel_december_2012.pdf (accessed 1 May 2018).
[2032] E.g., *Guinea Report*, *supra* note 39, paras. 272-273; *Eritrea Second Report*, *supra* note 569, para. 361(c); *HRC Burundi Detailed Report*, *supra* note 405, para. 741.
[2033] *HRC Burundi Detailed Report*, *supra* note 405, para. 746.

threat to the peace rather than legal responses to identified violations of international law."[2034] She identifies three purposes of sanctions: "(i) to coerce or change behaviour, (ii) to constrain access to resources needed to engage in proscribed activities, or (iii) to signal and stigmatize."[2035] Sanctions such as asset freezes and travel bans may be experienced as deprivations of rights or benefits. While sanctions have a detrimental impact, their purpose is preventive.[2036] In 2012, the Secretary-General reported that a workshop on the Security Council's role in accountability suggested the Council might authorise the use frozen assets for reparations payments.[2037] Such a proposal has not been made by commissions to date.

Occasionally, commissions addressed the role of private enterprises in ending violations. Some recommendations were made to actors with oversight over businesses.[2038] For instance, the High-Level Mission on Darfur recommended that the General Assembly compile "a list of foreign companies that have an adverse impact on the situation of human rights in Darfur"[2039] and called upon UN bodies to avoid transacting with listed entities. Recommendations were occasionally addressed to private companies. Notably, the Israeli Settlements Commission recommended that businesses evaluate the human rights impact of their activities and take all necessary steps to ensure that they did not adversely impact human rights, including terminating their business interests in Israeli settlements.[2040] Having found that proceeds from mining operations owned jointly by Eritrea and a transnational corporation were an important source of state revenue,[2041] the Eritrea Commission recommended that transnational corporations operating in Eritrea carry out human rights impact assessments to prevent future violations.[2042]

Commissions also invited the international community of states to take steps to end situations of violations. Some commissions linked these measures to states' legal obligations to repress violations of peremptory norms[2043] and ensure respect for IHL.[2044] Others invoked the 'responsibility to protect' (R2P) principle,[2045] which provides that states must protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that other states have a responsibility to use peaceful means to help protect populations from such atrocities. Where a state manifestly fails to protect its population and peaceful means are inadequate, states may take collective action through the Security Council, in accordance with

[2034] Van den Herik 2014, *supra* note 1890, at 431.
[2035] *Ibid*., at 433, citing Thomas Biersteker, Sue Eckert and Marcos Tourinho (eds), 'Designing United Nations Sanctions', *Targeted Sanctions Consortium*, August 2012, available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/internationalgovernance/shared/PSIG_images/Sanctions/Designing%20UN%20Targeted%20Sanctions.pdf (accessed 1 May 2018) and Francesco Giumelli, *Coercing, Constraining and Signaling: Explaining UN and EU Sanctions after the Cold War* (Colchester: ECPR Press, 2011).
[2036] *Ibid*., at 434.
[2037] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2012/376, 22 May 2012, para. 70.
[2038] *Israeli Settlements Report*, *supra* note 572, para. 117.
[2039] *Darfur High-Level Report*, *supra* note 1027, para. 77(j).
[2040] *Israeli Settlements Report*, *supra* note 572, para. 117.
[2041] *Eritrea Second Report*, *supra* note 569, para. 154.
[2042] *Ibid*., para. 364.
[2043] *Israeli Settlements Report*, *supra* note 572, para. 116.
[2044] E.g., *Gaza Report*, *supra* note 766, para. 684(a), citing CA 1, *supra* note 1287.
[2045] E.g., *Goldstone Report*, *supra* note 633, paras. 1875 and 1913; *Beit Hanoun Report*, *supra* note 620, para. 19.

the Charter.[2046] The North Korea Commission considered "the accountability of the international community"[2047] in light of R2P and found that a "corresponding legal obligation is also emerging"[2048] under rules of state responsibility. The Commission wrote that the international community must ensure that crimes against humanity ceased,[2049] including by ensuring that prison camps were dismantled.[2050]

Some commissions identified wider political action as a means to end situations of violations. The Syria Commission repeatedly stated that a politically-negotiated solution was the only way to end the Syrian conflict.[2051] The North Korea Commission considered ways to promote reconciliation between the DPRK and the Republic of Korea[2052] and recommended that urgent accountability measures "be combined with a reinforced human rights dialogue, the promotion of incremental change through more people-to-people contact and an inter-Korean agenda for reconciliation".[2053] The Eritrea Commission found that the non-implementation of the Algiers Agreement 2000 and the ruling on the demarcation of the Eritrean-Ethiopian border were pretexts for Eritrea's repressive practices[2054] and recommended that the international community assist those states "in solving border issues through diplomatic means".[2055] Eritrea objected to this as violating the terms of the Agreement, which obliged both states to accept the border delimitation decision as final.[2056] Dispute resolution was not the dominant function of these commissions, but such considerations came within their ambit where conflicts and disputes perpetuated situations of ongoing violations.

Occasionally, stronger enforcement measures were advocated. In respect of violations by ISIS, the Syria Commission recommended that the Security Council consider "engaging its Chapter VII powers, given the acknowledged threat ISIS imposes to international peace and security".[2057] Such recommendations did not always go unchallenged. Eritrea argued that the Eritrea Commission's recommendation that the Security Council decide that the situation in the concerned state threatened international peace and security[2058] was a "purely political determination"[2059] outside its mandate. To date, the Security Council has not made such a decision.[2060]

[2046] *World Summit Outcome Document*, *supra* note 287, paras. 138-139.
[2047] *North Korea Report*, *supra* note 32, para. 1166.
[2048] *Ibid*., footnote 1682.
[2049] *Ibid*., para. 1164.
[2050] *Ibid*., para. 1067.
[2051] E.g., *Syria Third Report*, *supra* note 564, paras. 150-151; *Syria Fifth Report*, *supra* note 1046, para. 159; *Syria Ninth Report*, *supra* note 1904, para. 137 and *Syria Thirteenth Report*, *supra* note 928, para. 109(e).
[2052] *North Korea Report*, *supra* note 32, para. 1222.
[2053] *Ibid*., para. 1220.
[2054] *Eritrea First Report*, *supra* note 567, para. 1524.
[2055] *Ibid*., para. 1536(j).
[2056] 'Response of the Government of Eritrea to the report of the Commission of Inquiry', in *Note verbale dated 19 June 2015 from the Permanent Mission of Eritrea to the United Nations Office at Geneva addressed to the Office of the President of the Human Rights Council*, UN Doc. A/HRC/29/G/6, 24 June 2015, Annex II, at 23 [*Eritrea Note Verbale*].
[2057] *They Came to Destroy*, *supra* note 1602, para. 207(b).
[2058] *Eritrea Second Report*, *supra* note 569, para. 361(a).
[2059] *Eritrea Press Release*, *supra* note 1012.
[2060] Arms sanctions in respect of Eritrea pertain to its suspected support of Al-Shabaab: SC Res. 2385 (2017).

3.5 Guarantees of non-repetition

Guarantees of non-repetition are another type of remedy recognised in the *Principles on the Right to a Remedy*. Such measures include institutional rule of law reforms, education and training in IHRL and IHL, and codes of conduct for governmental institutions and economic enterprises.[2061] As guarantees of non-repetition aim to avert future atrocities, accountability has synergies with prevention,[2062] although some commentators raise queries as to causality.[2063]

Commissions which investigated atrocities in states with weak, unstable, or authoritarian systems of governance recommended institutional rule of law reforms.[2064] For instance, the CAR Commission's first recommendation was that the Government of the CAR rebuild its legal system.[2065] Where violations were deemed endemic to systems of governance, commissions recommended fundamental reforms, which were often interpreted by concerned states as attempted regime change. The North Korea Commission found that crimes against humanity were "ingrained into the institutional framework"[2066] of the DPRK and that accountability "requires profound institutional reforms starting at the very top and centre of the nation's institutions".[2067] The DPRK rejected the report, stating that it would "strongly respond to the end to any attempt of regime-change and pressure under the pretext of 'human rights protection'."[2068] The Syria Commission stated that accountability was a "fundamental component of a transitional period leading to a State founded on the principles of rule of law, democracy and human rights".[2069] Syria objected to this statement as a veiled reference to regime change.[2070] The Syria Commission replied that its statement "does not refer to the founding of a new state, and [it] would never imply such an outcome."[2071] Instead, the text was said to refer to rule of law reforms that were underway or planned in Syria.[2072]

3.6 Concluding observations

UN atrocity inquiries' accountability recommendations reflect both retributive and restorative conceptions of justice, advocating prosecutions of international crimes as well as remedies recognising and compensating harm to victims. Some remedies proposed by commissions

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[2061] *Principles on the Right to a Remedy*, *supra* note 540, Principle 23.
[2062] *Transitional Justice Guidance Note*, *supra* note 1763, at 4.
[2063] Bass, *supra* note 135, at 294-295; Niki Frencken and Goran Sluiter, 'The United Nations Tribunals for Yugoslavia and Rwanda', in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: CUP, 2013) 386-410 and David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 Fordham Int'l LJ 473-488.
[2064] E.g., *Syria Second Report*, *supra* note 1109, para. 136; *Abidjan Report*, *supra* note 43, para. 90(a), (b) and (e).
[2065] *CAR Report*, *supra* note 32, Recommendation 1(a).
[2066] *North Korea Report*, *supra* note 32, para. 1193.
[2067] *Ibid*., para. 1194.
[2068] 'North Korea: We totally reject the U.N. report', *USA Today*, 18 February 2014, available at http://www.usatoday.com/story/opinion/2014/02/18/democratic-peoples-republic-of-korea-editorials-debates/5591393 (accessed 1 May 2018) [*North Korea response*].
[2069] 'Press Release by Commission of Inquiry on Syria,' 16 April 2012, available at http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12059&LangID=E (accessed 1 May 2018).
[2070] *Syria Third Report*, *supra* note 564, Annex I, at 30-34.
[2071] *Letter from Paulo Sergio Pinheiro to the Minister of Foreign and Expatriates Affairs of the Syrian Arab Republic dated 1 May 2012*, in *Syria Third Report*, *supra* note 564, Annex I, at 36.
[2072] *Ibid*.

aimed to end violations and guarantee their non-recurrence, linking accountability with prevention. Others went beyond immediate victims and perpetrators by seeking to correct root causes of atrocities through institutional reforms. Such recommendations show that commissions did not conceive of accountability as limited to the enforcement of specific legal responsibilities, but as a broader concept promoting the rule of law and durable peace.

Commissions addressed a range of actors beyond their mandating authorities, reflecting a conception of accountability in which many sectors of society play a role, including regional organisations, peace enforcement missions, and private enterprises. It is notable that many HRC-led commissions addressed the Security Council, suggesting that their recommendatory function transcends their immediate institutional setting. Such recommendations invite the Council's engagement where its own dynamics prevented action. Some HRC commissions informally briefed Council members,[2073] and situations of concern were occasionally added to its agenda.[2074] At the same time, the Council has been reluctant to act upon HRC-led commissions' recommendations.[2075]

Commissions' formulations of recommendations also indicated their awareness of the limits to their mandates, as well as institutional and political factors relevant to implementation. One strategy was to formulate discrete recommendations whose implementation would be highly visible. Such proposals would also channel advocacy efforts and reduce the need for negotiation of operational details and thereby risking political impasse. Such an approach is evident in the Darfur Commission's comprehensive proposal for an international compensation commission, although it was ultimately not implemented. Another strategy was to escalate recommendations as a situation deteriorated. For instance, the Syria Commission first made broad recommendations that Syria be referred to 'international justice',[2076] but as the situation deteriorated, it recommended ICC referral.[2077] After Russia blocked a draft referral,[2078] the Commission criticised the Council's lack of consensus as enabling impunity[2079] and proposed alternative ways to prosecute through an *ad hoc* tribunal[2080] and support of the IIIM.[2081] The Syria Commission's escalating recommendations reflected a desire to ensure accountability with or without the support of the Security Council.

Appreciation of political sensibilities was also reflected in commissions' invocations of R2P, which the the Secretary-General has described as encompassing "legal, moral and political

[2073] *North Korea Arria-Formula Meeting*, *supra* note 453.
[2074] *SC Press Release*, *supra* note 281; *Letter dated 5 December 2014 from the representatives of Australia, Chile, France, Jordan, Lithuania, Luxembourg, the Republic of Korea, Rwanda, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2014/872, 5 December 2014.
[2075] E.g., the Security Council imposed sanctions on the DPRK following the North Korea Commission's report, but the resolution did not mention human rights: SC Res. 2270 (2016).
[2076] *Syria Second Report*, *supra* note 1109, para. 139; *Syria Third Report*, *supra* note 564, para. 156.
[2077] E.g., *Syria Fourth Report*, *supra* note 1097, para. 180(b); *Syria Sixth Report*, *supra* note 1126, 206(d); *Syria Seventh Report*, *supra* note 805, para. 163(b); *Syria Eighth Report*, *supra* note 983, para. 148(b).
[2078] *Syria Eighth Report*, *supra* note 983, Annex II, para. 6.
[2079] *Syria Ninth Report*, *supra* note 1904, para. 132.
[2080] E.g., *ibid*., paras. 139 and 146(b); *Syria Eleventh Report*, *supra* note 20301337, para. 161(d) and *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/33/55, 11 August 2016, para. 147(c).
[2081] *Syria Thirteenth Report*, *supra* note 928, para. 109(a); *Syria Fourteenth Report*, *supra* note 982, para. 90(c).

responsibilities"[2082] to prevent atrocities. By invoking R2P, commissions appealed to states on the basis of international law as well as their political commitment to act.[2083] Finally, commissions' cognizance of political realities was reflected in proposals for immediate follow-up measures to monitor and report on recommendation uptake. However, where no accountability measures are taken, such mechanisms reflect a "circuit of responses"[2084] rather than inducing compliance. These tensions and others arising from commissions' institutional and normative positioning are explored further below.

4. Accountability Roles and Functions

This Section discusses commissions' roles and functions in relation to different dimensions of accountability for violations of international law. It does not seek to measure the general 'impact' of inquiry reports or establish causality between recommendations and implementation, in light of the significant methodological difficulties of such exercises.[2085] Rather, it highlights commissions' key roles and functions with respect to accountability by drawing on examples from practice. As discussed in Section 1, the concept of accountability has legal, moral, and political dimensions. As these dimensions are interrelated, there is some conceptual overlap. However, this typology allows for different elements of accountability to be foregrounded. This Section is structured as follows. Section 4.1 discusses how commissions facilitate 'legal' accountability, understood as binding enforcement of legal responsibilities. Section 4.2 discusses the 'moral' accountability function of inquiry, including uncovering the truth of violations and the potential expressive role of findings of responsibility. Section 4.3 discusses commissions' 'political' accountability function and the interplay with the politics of accountability more broadly.

4.1 Legal accountability

Inquiry reports can facilitate the enforcement of legal responsibilities in judicial proceedings. Scholars refer to such roles as 'force multipliers[2086] or 'catalysts'[2087] of judicial accountability. This role is reflected in the Darfur Commission's view that its assessment of international crimes represented "a first step towards accountability"[2088] and "will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law."[2089] The CAR Commission similarly saw its task as "to provide the foundations for a full-fledged criminal investigation".[2090]

[2082] *Implementing R2P*, *supra* note 1764, para. 11.
[2083] Lyal Sunga, 'The Human Rights Council', in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: CUP, 2013) 156-178.
[2084] Chinkin, *supra* note 97, at 495.
[2085] Rob Grace, 'Recommendations and Follow-up Measures in Monitoring, Reporting, and Fact-finding Missions', *HPCR Working Paper*, August 2014, at 15, available at http://ssrn.com/abstract=2480824 (accessed 1 May 2018) [Grace 2014].
[2086] David Kaye, 'Human Rights Prosecutors? The UN High Commissioner for Human Rights, International Justice, and the Example of Syria', in Felice Gaer and Christen Broecker, *The United Nations High Commissioner for Human Rights: Conscience for the World* (Leiden: Martinus Nijhoff, 2014) 245-265, at 262.
[2087] Devereux, *supra* note 409, at 119.
[2088] *Darfur Report*, *supra* note 32, para. 19.
[2089] *Ibid*., para. 524.
[2090] *CAR Report*, *supra* note 32, para. 16.

Some inquiry reports facilitated the establishment of international criminal tribunals or triggered international criminal jurisdiction. The Yugoslavia Commission's recommendation for prosecutions before an *ad hoc* tribunal[2091] was followed by the establishment of the ICTY.[2092] A similar course of events occurred in relation to the ICTR,[2093] though arguably the Rwanda Commission was created in service to the Security Council's desire to establish another *ad hoc* criminal tribunal.[2094] The Cambodia Commission's proposal for an *ad hoc* tribunal was not adopted, but its report informed negotiations between Cambodia and the UN, leading to the establishment of the Extraordinary Chambers in the Courts of Cambodia.[2095]

Inquiry reports have also been utilised by various actors triggering the ICC's jurisdiction. When referring Sudan to the ICC, the Security Council 'took note' of the Darfur Commission's report "on violations of [IHL] and [IHRL] in Darfur".[2096] The Union of the Comoros invoked the Gaza Flotilla Commission's report as evidence of crimes against humanity and war crimes when referring the situation onboard its flagged vessel to the ICC.[2097] The ICC Prosecutor has cited inquiry reports as sources of information in preliminary examinations.[2098] The General Assembly also cited inquiry reports when recommending that the Security Council refer the DPRK to the ICC[2099] and deciding to establish the IIIM in pursuit of criminal accountability.[2100]

In addition to acting as force multipliers for international criminal proceedings, some inquiry reports guided criminal investigations and were cited as evidence.[2101] For instance, the Yugoslavia Commission's database of evidence helped to "establish the location, character and scale of violations"[2102] at the ICTY, and information from the Darfur Commission allowed the ICC Prosecutor to plan the criminal investigation.[2103] In ICC proceedings, commissions' factual findings have been cited in decisions to authorize investigations,[2104] arrest warrant decisions,[2105] and confirm charges against defendants.[2106] While inquiry reports have not yet been cited in trial judgments, the Court's acceptance of NGO reports for

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[2091] *Yugoslavia Interim Report*, *supra* note 292, para. 74.
[2092] SC Res. 808 (1993).
[2093] *Rwanda Interim Report*, *supra* note 298, para. 150; SC Res. 955 (1994).
[2094] Bassiouni 2001, *supra* note 98, at 43 and Kaufman 2009, *supra* note 300, at 231.
[2095] 'Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders', 8 February 2002, available at http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm (accessed 1 May 2018); GA Res. 57/228, 18 December 2002; *Report of the Secretary-General on Khmer Rouge Trials*, UN Doc. S/57/769, 31 March 2003, Summary; GA Res. 57/228B, 13 May 2003.
[2096] SC Res. 1593 (2005), Preamble.
[2097] Union of the Comoros, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation*, 14 May 2013, available at http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf (accessed 1 May 2018).
[2098] E.g., ICC Prosecutor, 'Report on Preliminary Examination Activities 2014', para. 158, citing *Guinea Report*, available at http://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf (accessed 1 May 2018).
[2099] GA Res. 69/188, para. 8.
[2100] *IIIM Mandate*, *supra* note 330, Preamble.
[2101] Stahn and Jacobs, *supra* note 99, at 255-280.
[2102] Sunga 2011, *supra* note 733, at 193.
[2103] Moreno Ocampo, *supra* note 936, at 15.
[2104] E.g., *Burundi Investigation Decision*, *supra* note 1925.
[2105] E.g., *Prosecutor v. Omar Al Bashir*, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09, PTC I, 4 March 2009, para. 8.
[2106] *Prosecutor v. Laurent Gbagbo*, 'Decision on the confirmation of charges against Laurent Gbagbo', ICC-02/11-01/11, PTC I, 12 June 2014, para. 75(i), citing *HRC Côte d'Ivoire Report*, *supra* note 810.

corroborative purposes[2107] and citations of reports by peacekeeping missions[2108] suggests that UN inquiry reports may play a similar role. At the same time, the ICC has cautioned that human rights reports generally have less probative value, considering the different context and purpose for which they were prepared.[2109]

An emerging way in which commissions may facilitate legal accountability is in civil proceedings against states, individuals, and private enterprises. Throughout the *Bosnia Genocide* judgment, the ICJ cited the Yugoslavia Commission's factual findings, including estimated numbers of casualties.[2110] Inquiry reports have also been cited in civil suits against private actors in domestic courts. For instance, a case was brought in the US on the basis of the Alien Tort Statute against Jean Bosco Barayagwiza for inciting the Rwandan genocide. The US District Court referred to the Rwanda Commission's finding that between 500,000 and 1 million civilians were murdered in Rwanda.[2111] A recent development is a civil claim by members of the Eritrean diaspora against mining company Nevsun in Canada, alleging that the latter was liable for human rights violations in Eritrea. The Supreme Court of British Columbia admitted the Eritrea Commission's report into evidence in order to provide a contextual framework in which to assess first-hand evidence of violations.[2112] The Court cited the Commission's findings of lack of due process in the Eritrean judicial system[2113] and allowed the case to proceed to trial.[2114] In these cases, inquiry reports provided general information rather than evidence of specific violations However, such information might assist plaintiffs to establish the context of violations.[2115] Use in proceedings against private entities remains limited, as it depends on the availability of causes of action, the existence of an inquiry report and acceptance of the report into evidence. Should states further recognise civil liability for human rights violations, such use may expand in the future.

While it is theoretically possible for inquiry reports to facilitate enforcement of state responsibility, commissions' contributions in this respect have been less pronounced in practice. This may be partly due to issues of availability and access to mechanisms through which to determine and enforce state responsibility. However, concrete proposals for compensation schemes by the Darfur Commission and the Goldstone Commission[2116] were

[2107] *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08, TC III, 21 March 2016, para. 270.
[2108] *Lubanga Judgment*, *supra* note 1289, citing reports of the UN Organization Mission in the Democratic Republic of the Congo.
[2109] *Prosecutor v. Mathieu Ngudjolo Chui*, 'Judgment pursuant to article 74 of the Statute', ICC-01/04-02/12, TC II, 18 December 2012, para. 294.
[2110] *Bosnia Genocide Case*, *supra* note 1289. The ICJ cited reports of special rapporteurs in a similar manner: *Armed Activities Case*, *supra* note 1225, paras. 206-207 and *Wall Opinion*, *supra* note 1210, para. 133.
[2111] *Louise Mushikiwabo and others v. Jean Bosco Barayagwiza*, No. 94 CIV. 3627 (JSM), 9 April 1996 (US).
[2112] *Araya and others v. Nevsun Resources Ltd*., 2016 BCSC 1856, para. 138 (Canada), upheld on appeal: 2017 BCCA 401.
[2113] *Ibid*., para. 97.
[2114] *Ibid*., para. 296.
[2115] UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd ed, 2017) at 76.
[2116] *Goldstone Report*, *supra* note 633, para. 1971(b); GA Res. 64/10, 5 November 2009 and GA Res. 64/254, 25 March 2010. The HRC called on the High Commissioner for Human Rights to "determine the appropriate modalities for the establishment of an escrow fund for the provision of reparations": HRC Res. 13/9, para. 8.

not taken up by the Security Council and General Assembly, respectively. Political implications of this selectivity are discussed further at Section 4.3 below.

While commissions may promote legal accountability, implementation ultimately remains in the hands of political actors.[2117] There is a track record of uneven uptake of recommendations. For instance, the Security Council did not establish a mechanism to prosecute international crimes in Burundi,[2118] nor acted upon several HRC commissions' recommendations for ICC referrals.[2119] Many states did not fulfil their obligations to investigate and prosecute. Commissions are aware of this important limitation and appealed to stakeholders to act. A mission established upon the request of the Security Council in respect of the situation of Burundi cautioned:[2120]

> [T]he United Nations can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law.

The Gaza Commission also criticised the lack of implementation of recommendations of earlier fact-finding bodies in respect of the Israeli-Palestinian conflict as "[lying] at the heart of the systematic recurrence of violations in Israel and the Occupied Palestinian Territory."[2121] The Commission recommended that the HRC comprehensively review the implementation of recommendations by UN human rights bodies since 2009 and "explore mechanisms to ensure their implementation."[2122] In 2017, OHCHR reported that the rate for full implementation of recommendations was very low: 0.4 per cent for Israel, 1.3 per cent for Palestinian duty bearers, and 17.9 per cent for the international community and the UN.[2123]

Some scholars argue that it is counterproductive to establish inquiries when binding enforcement action does not follow. Zachary Kaufman questions whether the use of non-binding investigations represents "strength and creativity or weakness and superficiality in the pursuit of accountability".[2124] Frulli argues that it may be unhelpful for the HRC to establish accountability-oriented inquiries as it cannot take direct action, and suggests that such bodies be established by the Security Council.[2125] Frulli cautions that the HRC "runs the risk of getting tangled up in fact-finding activities, becoming an end in themselves and not a means to achieve accountability."[2126] Devereux writes that if recommendations are not implemented, commissions "are at risk of languishing to become 'historical markers', referred to in order to

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[2117] Bassiouni 2001, *supra* note 98, 48; Grace 2014, *supra* note 2085, at 5.
[2118] *SC Burundi Report*, *supra* note 307, para. 496.
[2119] E.g., Syria Commission, North Korea Commission, and Goldstone Commission.
[2120] *Burundi Assessment Report*, *supra* note 609, para. 72.
[2121] *Gaza Report*, *supra* note 766, para. 676.
[2122] *Ibid*., para. 685.
[2123] *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem: comprehensive review on the status of recommendations addressed to all parties since 2009*, UN Doc. A/HRC/35/19, 12 June 2017, paras. 60-62. See *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/37/41, 19 March 2018, pursuant to HRC Res. 34/28, 24 March 2017.
[2124] Kaufman 2018, *supra* note 439, at 106-107.
[2125] Frulli, *supra* note 102, at 1333.
[2126] *Ibid*., at 1336.

illustrate the absence of action".[2127] From this perspective, a commission whose recommendations are not implemented represents tolerance of impunity.

4.2 Moral accountability

The term 'moral accountability' is used here to refer to dimensions of accountability for violations of international law which may be achieved through processes which are not legally binding. Moral dimensions include truth-seeking and expressivist functions of findings of responsibility. While such functions may also be associated with binding judicial proceedings, they are arguably not limited to this context. This Section discusses the extent to which commissions' findings of violations and responsibilities have truth-seeking and expressivist functions.

Commissions' findings have value as an official record of atrocities and go some way towards giving effect to the right to the truth of serious violations. As written by the Special Rapporteur on the right to truth, while the fact of violations may already generally be known, truth-seeking mechanisms "make an indispensable contribution in officially and publicly acknowledging these facts".[2128] Cassese writes that UN atrocity inquiries "significantly contributed to uncovering the truth."[2129] Some commissions articulated that they carried out this function. For instance, the Eritrea Commission wrote that its objectives included providing a "comprehensive account of violations which could serve as a historical record for future accountability".[2130] The Beit Hanoun Commission sought "to draw on the accounts given to the mission to bring to the [HRC] as accurate a picture as possible of the shelling and its ongoing impact on victims and survivors."[2131]

The Sri Lanka Panel did not articulate its role as finding *the* truth but rather offering an alternative account that challenged the Sri Lankan Government's denial of perpetrating atrocities:[2132]

> This report makes clear that the Panel's view of the events leading up to the defeat of the LTTE and in the immediate aftermath is fundamentally different from that of the Government… By denying that its military operations resulted in tens of thousands of civilian deaths, and intimidating and threatening those who challenge that view, the Government is effectively closing off the opportunity to open a serious, national dialogue on the recent past and the needs of the future.

Ratner writes that the Panel aimed to "offer an alternative narrative to the Sri Lankan government's position that it had caused no civilian casualties and a new focal point for

[2127] Devereux, *supra* note 409, at 120.
[2128] *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN Doc. A/HRC/21/46, 9 August 2012, para. 30.
[2129] Antonio Cassese, 'Gathering up the Main Threads', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: OUP, 2012) 645-684, at 675.
[2130] *Eritrea Q&A*, *supra* note 89, at 1.
[2131] *Beit Hanoun Report*, *supra* note 620, para. 24.
[2132] *Sri Lanka Report*, *supra* note 29, para. 403.

discussion".[2133] In this context, official recognition of violations was essential for any transitional justice process to be fruitful.

There are also limits to commissions' truth-seeking function. Not all commissions sought to produce an authoritative narrative, as evidenced by the Palmer Commission's statement that its legal views were "no more authoritative"[2134] than those of Israel and Turkey. Secondly, commissions cannot comprehensively uncover the truth of violations. Their truth-seeking role is more modest than that of truth commissions, as evidenced by frequent recommendations that truth commissions should be established following their reports. On a practical level, resource shortages and lack of territorial access may significantly limit victims' participation.

It may also be queried to what extent findings of legal responsibility resemble 'truth'. Zegveld writes, "law is not about finding the truth. Law is a reasoned application of rules to presented and substantiated facts."[2135] Findings of legal responsibility are a particular type of narrative. Even comprehensive truth-seeking bodies cannot find 'the' truth; judgements must be made in respect of relevant facts in view of the purpose of the exercise and the intended audience.[2136] Blank writes that where parties distrust the legitimacy of an inquiry or when multiple entities conduct investigations, legal conclusions may reinforce pre-existing perceptions and the law may be used as a tool for "further disputes, and the struggle for control of the narrative."[2137]

Inquiry reports might also make expressive contributions by animating frameworks of IHRL, IHL and ICL and stigmatising serious violations. The theory of legal expressivism essentially provides that law and legal institutions can change or reinforce social meanings and by extension, people's attitudes, and behaviour;[2138] and that the "goal of trial and punishment is the expression of messages, often about moral or legal wrongdoing."[2139] This theory finds linkages with moral philosophy.[2140]

Several scholars ascribe an expressive function to international criminal courts and tribunals. While some authors focus on the expressive function of punishment,[2141] others also identify this function in the trial process.[2142] For instance, Margaret deGuzman argues that the ICC should focus on "expressing global norms"[2143] and identifies an expressive function in the Prosecutor's selection of situations and cases. Mirjan Damaška writes that the primary function of criminal tribunals should be didactic, bearing in mind their limited deterrent

[2133] Ratner, *supra* note 102, at 71.
[2134] *Palmer Report*, *supra* note 316, para. 14.
[2135] Zegveld 2012, *supra* note 1010, at 166.
[2136] Naqvi, *supra* note 2005, at 249-254 and Atrey, *supra* note 103.
[2137] Blank, *supra* note 481, at 102.
[2138] Cass Sunstein, 'On the Expressive Function of Law', (1996) 144 U Pa L Rev 2021-2053, at 2051; Matthew Adler, 'Expressive Theories of Law: A Skeptical Overview', (2000) 148 U Pa L Rev 1363-1501 and Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', (2016) 30(4) *Ethics & International Affairs* 429-447, at 432.
[2139] Meijers and Glasius, *supra* note 2138, at 433.
[2140] Andrew Koppelman, 'On the Moral Foundations of Legal Expressivism', (2001) 60 Md L Rev 777-784.
[2141] Joel Feinberg, "The Expressive Function of Punishment," (1965) 49(3) *Monist* 397-423; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 Stan J Int'l L 39-94.
[2142] Meijers and Glasius, *supra* note 2138, at 435 and Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court, (2012) 33(2) Mich J Int'l L 265-320, at 313.
[2143] DeGuzman, *supra* note 2142, at 270, and citations therein.

ability, arguing that courts should "aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity".[2144] However, the successful exercise of such a role requires that courts "be perceived by their constituencies as a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures."[2145]

Commissions might similarly affirm legal values and provide a sense of accountability by exposing and denouncing violations. Findings of responsibility express the elementary idea that actors are bound by international law and subject to scrutiny. Damaška's linkage of perceptions of legitimacy with legal rationality and fair process holds true for commissions to a greater degree in light of their *ad hoc* establishment by political bodies. However, it may be queried whether expressivism necessarily transposes from the trial context to non-binding inquiry. Antony Duff distinguishes the investigation of criminal conduct from the trial context:[2146]

> [T]rial is not just an inquiry on an alleged wrongdoer, which aims to determine the truth or otherwise of the proposition that she committed a specified wrong; it is a process through which she is called to answer—to answer to the charge that she committed this crime, and to answer for such wrongful conduct as is proved against her.

An inquiry cannot call suspected perpetrators to answer to allegations in the same manner as a criminal trial. It may be that the legally binding nature of a trial and judgment is essential for an expressive role. However, Mark Drumbl writes:[2147]

> Trials can educate the public through the spectacle of theater—there is, after all, pedagogical value to performance and communicative value to dramaturgy. This performance is made all the more weighty by the reality that, coincident with the closing act, comes the infliction of shame, sanction, and stigma upon the antagonists.

While inquiry reports do not directly produce legal sanctions, they may well inflict 'shame, sanction, and stigma', in the sense of reputational costs. In this sense, the expressivist function links with the idea of accountability as "having to answer for one's actions in terms of human rights and humanitarian standards, with some measure of sanction if violations are found".[2148]

Much has been written about how shaming can induce actors to comply with obligations.[2149] Michael Kirby and Sandeep Gopalan observe that a "proper appreciation of shaming

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[2144] Mirjan Damaška, 'What is the Point of International Criminal Justice?', (2008) 83(1) Chi-Kent L Rev 329-365, at 345.

[2145] *Ibid*.

[2146] Antony Duff, 'Can we Punish the Perpetrators of Atrocities?', in Thomas Brudholm and Thomas Cushman (eds), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives* (New York: CUP, 2009) 79-104, at 82.

[2147] Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: CUP, 2007) at 175.

[2148] Christine Bell, 'Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 328-370 at 331, citing Nico Krisch, 'The Pluralism of Global Administrative Law', 17 EJIL (2006) 247-278, at 249.

[2149] E.g., James Franklin, 'Human Rights Naming and Shaming: International and Domestic Processes', in H. Friman (ed.), *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (Basingstoke: Palgrave Macmillan, 2015) 43-60 and Emilie Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem', (2008) 62 *International Organization* 689-716.

illustrates the powerful role that the institution of [inquiry] can play in international law."[2150] They argue that shaming and negative publicity can induce compliance by the concerned state and oblige the international community to acknowledge violations and take corrective action.[2151] Abbott and others write that institutions that report on compliance with legal norms create "implicit sanctions for states that wish to be seen as trustworthy members of an international community."[2152]

Commissions' findings can also counteract denials by concerned states and provoke them into 'rhetorical entrapment', whereby denial gives way to instrumental engagement with norms, which are eventually internalized.[2153] For instance, following the North Korea Commission's report, several states condemned the concerned state's human rights record[2154] and Botswana terminated its diplomatic relations.[2155] Although the DPRK dismissed the report as fabricated by 'hostile forces',[2156] Pyongyang dispatched its foreign minister to the General Assembly for the first time in fifteen years[2157] and issued its own human rights report.[2158] The timing of these events invites the view that the DPRK was responding to sharpened pressure levelled at it as a result of the Commission's report. Conversely, some scholars observe that the language of international law may not always be effective in encouraging compliance, but instead lead to a hardening of positions and resistance. Patricia Goedde writes that North Korea perceives human rights discourse as 'lawfare' and that "rights diffusion may be more successfully localized if it resonates within an easily understood cultural context", using alternative discourses and frameworks.[2159] Inquiry reports may induce actors to strategically utilise the international legal framework but whether they encourage norm internalization is another matter.

Some authors identify limits to the expressive functions of international criminal courts which might be shared by commissions of inquiry. These obstacles include barriers to communication with different audiences[2160] and Western cultural assumptions arguably latent

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[2150] Kirby and Gopalan, *supra* note 60, at 294.
[2151] *Ibid*., at 284 and 294.
[2152] Abbott *et al*, *supra* note 8, at 418.
[2153] Stanley Cohen, 'Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims', (1996) 18 HRQ 517-543.
[2154] E.g., US Department of State, 'Release of the Final Report of the UN Commission of Inquiry into the Human Rights Situation in the D.P.R.K.', 17 February 2014, available at http://2009-2017.state.gov/r/pa/prs/ps/2014/02/221710.htm (accessed 1 May 2018); UK Foreign and Commonwealth Office, 'DPRK Human Rights Violations Condemned', 28 March 2014, available at http://www.gov.uk/government/news/dprk-human-rights-violations-condemned (accessed 1 May 2018); New Zealand Parliament, 'Motions – Human Rights – Democratic People's Republic of Korea', (10 May 2016) 713 NZPD 10879.
[2155] Kwanwoo Jun, 'Botswana Cuts North Korea Ties', *Wall Street Journal*, 20 February 2014, available at http://blogs.wsj.com/korearealtime/2014/02/20/botswana-cuts-north-korea-ties (accessed 1 May 2018).
[2156] *North Korea response*, *supra* note 2068.
[2157] Oliver Hotham, 'DPRK foreign minister to attend UN General Assembly', *NK News*, 1 September 2014, available at http://www.nknews.org/2014/09/dprk-foreign-minister-to-attend-un-general-assembly (accessed 1 May 2018).
[2158] *Report of the DPRK Association for Human Rights Studies*, 23 September 2014, available at http://www.kfausa.org/report-dprk-association-human-rights-studies (accessed 1 May 2018).
[2159] Patricia Goedde, 'Human Rights Diffusion in North Korea: The Impact of Transnational Legal Mobilization', (2017) *Asian Journal of Law and Society* 1-29, at 20.
[2160] Meijers and Glasius, *supra* note 2138, at 433.

in ICL.[2161] Shiri Krebs issues a more fundamental challenge to the expressivist role of commissions which make findings of legal responsibility. She argues that commissions engage in the 'legalization of truth', defined as "adoption of legal discourse to construct and interpret facts outside the courthouse",[2162] in the belief that "legal reports uniformly inform the relevant publics with an authoritative account of what happened and motivate domestic sanctioning of in-group offenders".[2163] Based on the results of empirical experiments, Krebs argues that while 'legal truth' provides a framework through which to understand facts, legal discourse in inquiry reports is likely to trigger cognitive and emotional biases and belief polarization; reduce perceptions of the fairness of the report and be less effective than moral framing in influencing attitudes on accountability.[2164] She recommends greater recognition of the limitations of legal discourse in respect of the interpretation of facts and the nature of its influence on attitudes and beliefs.[2165] While the experiments may not have external validity,[2166] Krebs' study invites scrutiny of commonly held assumptions regarding 'legal truth' and juridified fact-finding.

4.3 Political accountability and accountability politics

Several commissions identified institutional and political reforms as necessary to comprehensively address violations and prevent their recurrence, especially in respect of conflict situations and authoritarian regimes. For instance, the North Korea Commission wrote, "[o]nce a process to carry out profound political and institutional reforms within the DPRK is underway, a parallel Korean-led transitional justice process becomes an urgent necessity."[2167] Commissions' recommendations for political and institutional reform were rather broad and generalized in comparison with their detailed consideration of modalities for legal accountability. Ratner writes that a legalistic focus ignores the fact that accountability is a "fundamentally political process"[2168] which must be achieved gradually with consensus. Ratner cautions that politics "does and should affect the interpretation of a commission's mandate, the tone of the report, and the recommendations",[2169] so fact-finding demands political as well as legal expertise. Other commentators are less enthusiastic about overt engagement with politics. Saxon writes that while commissions should not ignore the political context, they should distinguish documenting the political situation from seeking to achieve political objectives to avoid "colouring their results with political influences".[2170] Moreover,

[2161] Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law', *iCourts Working Paper Series No. 38*, January 2016, available at http://ssrn.com/abstract=2711236 (accessed 1 May 2018).
[2162] Shiri Krebs, 'The Legalization of Truth in International Fact-Finding', (2017) 18(1) Chi J Int'l L 83-163, at 83.
[2163] *Ibid*.
[2164] *Ibid*.
[2165] *Ibid*.
[2166] These findings may be limited to the US context as all respondents were US nationals and the experiments measured beliefs concerning reports of war crimes by US marines during a military operation in Afghanistan: *ibid*., at 91.
[2167] *North Korea Report*, *supra* note 32, para. 1203.
[2168] Ratner 2015, *supra* note 401, at 554.
[2169] *Ibid*.
[2170] Saxon, *supra* note 736, at 213.

commissions should not make recommendations aimed at "resolving or ameliorating the situations or events that they investigate."[2171]

It might be thought that by focusing on legal rather than political responses, commissions avoid the appearance of politicization. However, some scholars identify latent politics in legal processes and in particular the turn towards criminal law in human rights practice. Engle observes, "as advocates increasingly turn to [ICL] to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical."[2172] Laurel Fletcher writes that international efforts to secure accountability mostly focus on individuals, and observes:[2173]

> One question that the neglect of international State accountability raises is whether international criminal accountability is a mere distraction or decoy drawing attention away from addressing the role of States in perpetrating atrocity crimes and in maintaining structures that may threaten peace, even after responsible leaders have been prosecuted in The Hague.

This view finds synergies with the critique that an emphasis on individual responsibility can distract from or mask responsibilities of collective actors.[2174] From this perspective, a legal focus does not reduce the influence of politics, but rather reflects a change in their manifestation.

It may be queried whether inquiry reports can transcend power politics.[2175] Stanley Cohen observes that responses to IHRL violations often do not arise from the violation *per se* but because the response aligns with geopolitical interests.[2176] Bassiouni observes that because the UN operates as a political process, the activity of upholding accountability and human rights is conditioned by political oversight.[2177] Bassiouni sees sophisticated *realpolitik* at work in all cases, including 'successes' such as the Security Council's referral of the situation in Darfur.[2178] Schwöbel-Patel argues that accountability-oriented commissions are utilised as part of an "intervention formula"[2179] by global powers and "implicated in international law's entwinement in a civilising mission"[2180] of liberal internationalism. Other commentators are more optimistic, viewing commissions as capable of influencing political actors and processes. For instance, Alston writes that the Darfur Commission's report promoted transparency and accountability in the Security Council, and that "[i]t is one thing for the Council to be confronted only with diffuse political pressures, some media exposés, and a

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[2171] *Ibid*., at 222 (citations omitted).
[2172] Engle, *supra* note 784, at 1071.
[2173] Laurel Fletcher, 'A Wolf in Sheep's Clothing: Transitional Justice and the Effacement of State Accountability for International Crimes', (2016) 39 Fordham Int'l LJ 447-531, at 517.
[2174] See Chapter Two, Section 6.1.
[2175] See Richard Burchill, 'From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice', in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 255-296.
[2176] Cohen, *supra* note 2153.
[2177] Bassiouni 2001, *supra* note 98, at 55.
[2178] Bassiouni 2016, *supra* note 773, at 373-374.
[2179] Schwöbel-Patel, *supra* note 103, at 166.
[2180] *Ibid*., at 165.

range of civil society perspectives when determining whether or not to take action in a human rights situation. It is quite another to have to respond to a carefully documented and powerfully argued analytical report."[2181] Although UN atrocity inquiries operate within a political context, they may in turn condition that context.

Conclusions

Commissions examined the responsibilities of a range of actors for violating international law, with analysis centring on states and, increasingly, individuals. This area of focus is perhaps not surprising considering the centrality of individual responsibility in commissions' mandates and the dominance of criminal responsibility in accountability discourse more generally. Such a focus is not value-free, but rather reflects choices to construct 'legal truth' rather than other narratives and to focus on individual accountability. While a legal focus may appear to be objective, from a critical perspective, it reflects and may even disguise political interests.

Commissions' recommendations represent considerations of feasibility and pragmatism as well as a commitment to legal principles. Their proposals for modalities of international criminal prosecutions, truth-seeking mechanisms and reparations reflect an appreciation of the situation 'on the ground' and the needs of affected communities. By linking states' legal obligations with political commitments such as R2P, commissions presented a multi-dimensional approach to accountability bolstered by legal and political doctrines. Their 'legacy planning' proposals for follow-up mechanisms revealed commissions' awareness of the need to continue applying pressure after their mandates had formally concluded.

Commissions have both instrumental and intrinsic roles to play in ensuring accountability for violations of international law. Their reports may encourage enforcement of legal responsibilities and also represent a form of moral sanction. These different functions arguably call for different levels of engagement with responsibility regimes. In respect of legal accountability, commissions' findings should be sufficiently robust to make the case for corrective action while not duplicating or contradicting the work of judicial bodies. Such an approach may not warrant in-depth analysis or firm conclusions of responsibility, especially ICL. By contrast, if seeking to denounce violators and impose reputational costs, more detailed analysis may be in order. Such a role may be more pronounced where legal accountability is unlikely for political or practical reasons.

Commissions also touched upon political and policy-based measures as part of a broad approach to accountability that included preventive dimensions. Commentators are divided as to the desirability of commissions' engagement with political aspects of situations. It may further be argued that commissions should concentrate on supporting particular accountability responses rather than acting as a 'jack of all trades'. Hellestveit argues that otherwise, a commission risks becoming purposeless, "weakening its potential impact, except for its symbolic value as an expression of concern by the international community."[2182] However, this symbolic or expressive function should not be entirely discounted. Commissions can

[2181] Alston 2005, *supra* note 96, at 606.
[2182] Hellestveit, *supra* note 20, at 369-370.

recognise victims' experiences, affirm rights and protections, denounce violations, and stigmatise perpetrators. From this perspective, they are not only a step along the road to accountability but may be accountability mechanisms "in their own right".[2183] Though borne out of political forces and ultimately returning to them, UN atrocity inquiries represent a moment in which the value of accountability is independently affirmed and are an important part of the UN's contemporary accountability architecture.

[2183] Butchard and Henderson, *supra* note 104, at 21 (emphasis omitted).